Supreme Court, U.S.
FILED

02 352 SEP 3 2002

OFFICE OF THE CLERK

No.

In the

Supreme Court of the United States

RICHARD LEE SMITH, Individually and as Personal Representative of the Estate of Richard Hadaway Smith, Deceased; NANCY G. SMITH, Individually and as Personal Representative of the Estate of Richard Hadaway Smith, Deceased,

Petitioners,

v.

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Jack A. Gold
Counsel of Record
Karp, Frosh, Lapidus, Wigodsky & Norwind, P.A.
1133 Connecticut Ave., N.W.
Suite 250
Washington, DC 20036
(202) 822-3777
Attorneys for Petitioners

CURRY & TAYLOR • (202) 393-4141 • HTTP://USSCINFO.COM

QUESTIONS PRESENTED FOR REVIEW

1. Whether this Court's decision in *United States v. Gaubert*, 499 U.S. 315 (1991), construing the "discretionary function" exception to the Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 2680(a), provides the appropriate framework for analyzing § 80 of the Washington Metropolitan Area Transit Authority ("WMATA") Compact, pursuant to which WMATA is liable for any torts "committed in the conduct of any proprietary function," but not "for any torts occurring in the performance of a governmental function."

2. Whether Justice Scalia's concurring opinion in *Gaubert*, rather than *Gaubert's* "susceptible to policy analysis" standard, provides a more appropriate framework for determining WMATA's liability for the negligent operation of one of its underground railway stations where WMATA has produced no evidence that anyone actually engaged in a policy-based analysis regarding the negligent conduct at issue, much less anyone whose official responsibilities include engaging in such an analysis.

TABLE OF CONTENTS

QUESTIONS PRESENTED i
TABLE OF CONTENTS ii
TABLE OF AUTHORITIES iii
OPINIONS BELOW 1
JURISDICTION 1
STATUTORY PROVISION INVOLVED 1
STATEMENT OF THE CASE 2
REASONS FOR GRANTING THE WRIT 8
CONCLUSION 18
APPENDIX
CIRCUIT COURT ORDER (5/10/02) 1a
DISTRICT COURT ORDER (2/7/01) 37a
ORDER DENYING REHEARING 58a

TABLE OF AUTHORITIES

CASES

ARKANSAS RIVER CO. V. CSX TRANSPORTATION, 780 F.SUPP. 1138 (W.D.KY.1991) 7

BAUM V. UNITED STATES, 986 F.2D 716 (4TH CIR. 1993) 11

BERKOVITZ V. UNITED STATES, 486 U.S. 531 (1988) 10

BROTMAN V. UNITED STATES, 111 F.SUPP.2D 418 (S.D.N.Y. 2000) 16

BURKHART V. WMATA, 112 F.3D 1207 (D.C. CIR. 1997) 8, 9

CESTONARO V. UNITED STATES, 211 F.3D 749 (3RD CIR. 2000) 11

COPE V. SCOTT, 45 F.3D 445 (D.C. CIR. 1995) 12, 14, 15

DANT V. DISTRICT OF COLUMBIA, 829 F.2D 69 (D.C.CIR.1987) 7, 15

DOMME V. UNITED STATES, 61 F.3D 787 (10TH CIR. 1995) 11, 12, 13

FLEMING V. UNITED STATES, 69 F.SUPP.2D 837 (W.D.VA. 1999) 16

GOTHA V. UNITED STATES, 115 F.3D 176 (3D CIR.1997) 7

HURD V. UNITED STATES, 134 F.SUPP.2D 745 (D.S.C. 2001) 16

KISKA CONSTR. CORP. V. WMATA, 167 F.3D 608 (D.C. CIR. 1999) 2

NATIONAL UNION FIRE INS. V. UNITED STATES, 115 F.3D 1415 (9TH CIR. 1997) 11

PUERTO RICO AQUEDUCT & SEWER AUTH. v. METCALF & EDDY, INC., 506 U.S. 139 (1993) 2

SHANSKY v. UNITED STATES, 164 F.3D 688 (1ST CIR. 1999) 11

UNITED STATES v. CARROLL TOWING CO., 159 F.2D 169 (2ND CIR. 1947) 12

UNITED STATES v. GAUBERT, 499 U.S. 315 (1991) ..... *passim*

WAINWRIGHT v. WMATA, 903 F.SUPP. 133 (D.D.C.1995) 7

WAINWRIGHT v. WMATA, 958 F.SUPP. 6 (D.D.C. 1997) 15

STATUTES

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1346(b)(1) 13

28 U.S.C. § 2680(a) 2, 7, 16

OTHER AUTHORITIES

Deborah F. Buckman, Annotation, Liability of United States for Failure to Warn..., 169 A.L.R. Fed. 421 (2001) 11

ORDERS ENTERED IN THE CASE

The published decision of the United States Court of Appeals for the Fourth Circuit, dated May 10, 2002, is reproduced at page 1a of the Appendix, and appears at 290 F.3d 201. The Fourth Circuit's order denying rehearing, dated June 4, 2002, is reproduced at page 58a of the Appendix. The decision of the United States District Court for the District of Maryland (Southern Division), dated February 7, 2001, is reproduced at page 37a of the Appendix, and appears at 133 F.Supp.2d 395.

STATEMENT OF THE BASIS OF JURISDICTION OF THE SUPREME COURT

This is an appeal of a final judgment of the United States Court of Appeals for the Fourth Circuit entered on May 10, 2002. Petitioners filed a timely Petition for Rehearing on May 23, 2002, which the Fourth Circuit denied on June 4, 2002. Jurisdiction in this Court is pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

1. Section 80 of the Washington Metropolitan Area Transit Authority ("WMATA") Compact, Md. Code Ann., Transp. § 10-204(80): The Authority shall be liable for its contracts and for its torts and those of its directors, officers, employees and agents committed in the conduct of any proprietary function, in accordance with the law of the applicable signatory (including rules on conflict of laws), but shall not be liable for any torts occurring in the performance of a governmental function. The exclusive remedy for such breach of contracts and torts for which the Authority shall be liable, as herein provided, shall be by suit against the Authority. Nothing contained in this title shall be construed as a waiver by the District of Columbia, Maryland, Virginia and the counties and cities within the zone of any immunity from suit.

2. The "discretionary function exception" to the Federal Tort Claims Act, 28 U.S.C. 2680(a): The provisions of this chapter and section 1346(b) of this title shall not apply to –

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

STATEMENT OF THE CASE

JURISDICTION IN THE DISTRICT COURT AND COURT OF APPEALS

Petitioners filed this wrongful death and survival action in the United States District Court for the District of Maryland (Southern Division) against the Washington Metropolitan Area Transit Authority ("WMATA"). The District Court had jurisdiction pursuant to § 81 of the WMATA Compact, Md. Code Ann., Transp. § 10-204(81). The Fourth Circuit had jurisdiction over the denial of WMATA's motion for summary judgment, predicated on the issue of WMATA's immunity from liability under § 80 of the WMATA Compact, based on the principle that the denial of a governmental immunity claim by a District Court constitutes an appealable interlocutory decision. *See, e.g., Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 144 (1993); *KiSKA Constr. Corp. v. WMATA*, 167 F.3d 608, 610-11 (D.C. Cir. 1999).

STATEMENT OF FACTS

I. Factual Background

Richard Hadaway Smith ("the Decedent"), collapsed and suffered a fatal heart attack on the afternoon of July 20, 1998, immediately after climbing approximately 160 steps, totaling more than 100 vertical feet, on an escalator

("Escalator No. 1") the Washington Metropolitan Area Transit Authority ("WMATA") had shut down and transformed into a "stationary walker" at its underground Bethesda Metrorail Station ("the Bethesda Station"). Escalator No. 1 is one of three escalators at the Bethesda Station which are among the longest escalators in the United States. The three escalators and a single elevator provide the only means of passenger egress from the Bethesda Station. The other two escalators (Escalator No. 2 and Escalator No. 3) were completely closed to passengers at the time of the incident and, although operational, the single elevator was incapable of transporting arriving passengers from the Bethesda Station without significant delay.[1]

According to WMATA, if either Escalator No. 2 or Escalator No. 3 had been "available" for passenger use as a stationary walker on the date of the incident, it would have been used as such for descending pedestrian traffic while Escalator No. 1 would have remained operating as an ascending escalator, thereby allowing the most efficient means of ingress and egress from the Bethesda Station. Escalator No. 2, however, had been disabled for "long-term repairs" nearly two weeks before the incident, and remained completely closed to passengers by the State of Maryland due to a failed safety inspection. On July 19, 1998, one day before the incident, WMATA technicians discovered a "problem" with the drive chain on Escalator No. 3. Despite this "problem," Escalator No. 3 was nevertheless fully operational, and it was not closed to passengers until the morning hours on the date of the incident, at which time steps were removed from the escalator in order to begin the

---

[1] As many as 100 people were already attempting to board the elevator at the time of the incident, with more arriving on each train that entered the Bethesda Station. WMATA estimates that 628 passengers per hour exit the Bethesda Station during peak operational times such as the time of the incident. The elevator, however, is capable of transporting just one-third (approximately 216) of those ascending passengers per hour. By contrast, had any one of the Bethesda Station's three escalators been operating in the ascending direction, it could have carried approximately 5,400 passengers per hour.

repair.[2]

Significantly, WMATA cannot specify who ultimately decided to commence repairs on Escalator No. 3 and to shut down Escalator No. 1 for use as a stationary walker after the morning rush hour on July 20, 1998. Although, generally, WMATA mechanics and station managers have authority to shut down escalators they deem unsafe, WMATA's escalator superintendent was uncertain as to whether the WMATA Operations Control Center needed to authorize a decision to shut down an otherwise fully operational escalator (*e.g.*, Escalator No. 1 on the date of the incident). Additionally, WMATA's expert witness could not determine whether the decision to shut down Escalator No. 1 was made by the Bethesda Station manager, the repair crew, the maintenance department, "or whether it was standard policy or what."

According to Petitioners' safety expert, the Decedent's death "occurred because of significant deficiencies in the maintenance and operation" of the Bethesda Station. Specifically, an indeterminate WMATA employee unreasonably decided to service Escalator No. 3 on the date of the incident, and to transform the only functioning escalator (Escalator No. 1) into a narrow, ten story stairway for both ascending and descending traffic. Citing various authorities, including specific requirements of industry guidance documents, model codes and national standards promulgated by the American National Standards Institute (ANSI) and the American Society of Mechanical Engineers (ASME), Petitioners' safety expert explained why the use of stationary escalators as stairways is generally disfavored, noting that "pedestrian use of stopped escalators is

---

[2] The WMATA mechanic who replaced the drive chain on Escalator No. 3 indicated that the repair did not commence on the date of the incident until *after* the morning rush hour ended at 9:30 a.m., and that until that time Escalator No. 3 was being used as a stationary walker for descent into the Bethesda Station while Escalator No. 1 was operating as an ascending escalator. Moreover, although the work on Escalator No. 3 had not been completed, its steps had been replaced on the day following the incident and Escalator No. 3 was once again being used as a stationary walker with Escalator No. 1 operating as an ascending escalator.

undesirable and contrary to model code requirements."[3] Petitioners' safety expert further opined that, having taken Escalator No. 3 out of service, WMATA should have warned passengers bound for the Bethesda Station that none of the escalators were operating so that passengers could have chosen to exit at a different station – a procedure WMATA has employed in the past. WMATA "should have known that this [lack of any working escalators] was an unusual challenge to the ... patrons of their system, in general, and it was a particular challenge that day because of the heat."[4] Indeed, according to Petitioners' cardiology expert, the extraordinary stress of climbing the equivalent of a ten story building without a landing on which to stop and rest, on an extremely hot and humid summer afternoon – an activity placing far more stress on even a healthy individual than simply climbing a single flight of stairs – caused the Decedent's fatal heart attack.

---

[3] WMATA's safety expert also acknowledged that both the relevant ANSI standard and the State of Maryland disfavor the use of escalators as

[4] According to the Report of Petitioners' safety expert:

> WMATA had ample notice even on the day of the
>
> available for normal operation quickly once the decision was made to replace the drive chain. It had several hours to prepare for the afternoon peak when a larger number of people would be exiting the trains at the station and needed to ascend to the street.... WMATA should have known that, quantitatively, they had a problem with the egress capacity of the station for people who should not or could not climb the 107 vertical feet to the bus loading level. In other circumstances, which occur with some frequency in the WMATA Metro system based on my experience as a patron, train operators announce that an elevator is not available at a certain station and that one can get a bus from an adjoining station which has elevator capacity. WMATA should have employed similar measures in this case.

II. Procedural Background

Petitioners, the parents of the Decedent, initiated a wrongful death and survival action against WMATA in the Southern Division of the United States District Court for the District of Maryland. WMATA eventually moved for summary judgment arguing, *inter alia*, it is immune from liability for the conduct at issue pursuant to § 80 of the WMATA Compact.[5] The District Court, Judge Alexander Williams, Jr. presiding, denied WMATA's motion:

> The Court believes that this case presents the type of situation to which Congress and the signatories to the WMATA Compact intend to waive immunity. The duty of a common carrier to provide a safe means of ingress and egress is widely recognized. This is particularly true in the instance of an underground railway where the common carrier controls the avenues of entrance and exit. The passengers cannot tunnel out of the ground on their own. They are confined to the routes the carrier provides. The Court believes that maintaining and repairing the existing instrumentalities of ingress and egress from the premises of a common carrier is not the type of decision inherently grounded in regulatory, economic, or social policy. Others courts have similarly found that the discretionary exception does not apply to the failure to properly maintain and repair existing facilities that are intended for public use. *See Gotha v. United States*, 115 F.3d 176, 181-82

---

[5] Pursuant to § 80 of the WMATA Compact, WMATA "shall be liable ... for its torts and for those of its ... agents committed in the conduct of any proprietary function in accordance with the law of the applicable signatory..., but shall not be liable for any torts occurring in the performance of a governmental function." Md. Code Ann., Transp. § 10-204(80). The State of Maryland, the Commonwealth of Virginia and the District of Columbia are the signatories to the Compact.

> (3d Cir.1997); *Dant v. District of Columbia*, 829 F.2d 69, 75 (D.C.Cir.1987) (finding that faulty maintenance and operation of fare collection machines was not included within the scope of WMATA immunity); *Wainwright v. WMATA*, 903 F.Supp. 133, 140 (D.D.C.1995) (concluding that failure to maintain station escalator was not within the scope of WMATA immunity); *Arkansas River Co. v. CSX Transportation*, 780 F.Supp. 1138, 1140-41 (W.D.Ky.1991). Accordingly, the Court finds that Plaintiff's negligence claims for failure to maintain and repair the escalators is not barred by WMATA's immunity under the WMATA Compact. [Apx. 55a-56a.]

WMATA noted an interlocutory appeal to the United States Court of Appeals for the Fourth Circuit, where a 2-1 panel decision vacated the District Court's decision. According to Judge Robert B. King's majority opinion in which Judge Roger L. Gregory joined, the Fourth Circuit should follow the lead of the D.C. Circuit wherein questions regarding WMATA's immunity under the Compact are analyzed in the same manner as questions regarding the federal government's immunity under the "discretionary function exception" to the Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 2680(a).[6] [Apx. 7a.] Applying this type of analysis, the majority held that the cloak of WMATA's immunity extended to shield WMATA from liability for the decision to transform Escalator No. 1 into a stationary walker; the decision to leave Escalator No. 3 disassembled rather than replace the steps and use it as a stationary walker pending arrival of a replacement part; and the decision to provide no warning to passengers regarding the situation at the Bethesda

---

[6] Pursuant to 28 U.S.C. § 2680(a), excepted from the FTCA are claims "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused."

Station. [Apx. 13a.]

Judge M. Blane Michael, concurring in part and dissenting in part, disagreed with the majority's decision to analyze this case in terms of the FTCA discretionary function exception because, in his view, the framers of the WMATA Compact did not intend for § 80 to "sweep so broadly" as the majority opinion suggests. [Apx. 18a.]

REASONS FOR GRANTING THE WRIT

This case involves issues of exceptional importance regarding the proper analysis for determining the extent of WMATA's immunity from tort liability as set forth in § 80 of the WMATA Compact. Although in this case the Fourth Circuit followed the lead of the D.C. Circuit in applying the FTCA discretionary function exception when analyzing WMATA's immunity under the Compact, this Court has yet to address the proper analysis and extent of WMATA's immunity – an issue which impacts the millions of residents of the greater Washington metropolitan area, as well as the millions of non-residents who visit our nation's capital every year.

As Judge Michael noted in his concurring/dissenting opinion, the panel majority followed the D.C. Circuit by holding that the immunity conferred upon WMATA pursuant to § 80 of the WMATA Compact "is at least as broad as that conferred by the discretionary function exception" to the FTCA. [Apx. 17a.] According to the D.C. Circuit (and, now, the Fourth Circuit), WMATA is immune from liability for any acts and omissions that are "susceptible to policy analysis" under the standard established in *United States v. Gaubert*, 499 U.S. 315, 325 (1991). *See Burkhart v. WMATA*, 112 F.3d 1207, 1216-17 (D.C. Cir. 1997). Applying the *Gaubert* standard in this case, the panel majority concluded that WMATA is entitled to immunity on all but one of the theories of negligence advanced by Petitioners in the District Court because the decisions "*could have been* based on a judgment that the costs of reassembling [Escalator No. 3] outweighed the safety benefits of reassembly." [Apx. 18a (emphasis supplied).]

As Judge Michael further noted, the Fourth Circuit's decision suggests that, under *Gaubert*, virtually *any* decision that can be characterized as an effort to cut costs is the type of policy-based decision that the FTCA's discretionary function exception was designed to shield:

> Remarkably, this extremely broad reading of the discretionary function exception appears to be consistent with our prior cases. Although there is something commendable in the majority's refusal to flinch from *Gaubert's* implications, the majority's analysis makes it disturbingly clear that the discretionary function exception has in fact swallowed up the FTCA's ostensibly broad waiver of sovereign immunity. This means that the majority's initial decision to follow the D.C. Circuit comes at a heavy price: the price of maintaining consistency between our circuit and the D.C. Circuit is nothing less than evisceration of the waiver of sovereign immunity in section 80 of the [WMATA] Compact. [Apx. 18a.]

Section 80 of the WMATA Compact provides that WMATA "shall be liable for its contracts and for its torts and those of its directors, officers, employees and agents committed *in the conduct of any proprietary function* ... but shall not be liable for any torts occurring in the performance of a governmental function." *See* note 5, *supra* (emphasis supplied). The D.C. Circuit has read § 80 to confer immunity on WMATA for all "quintessential governmental function[s]," such as police activity. *Burkhart*, 112 F.3d at 1216 (internal quotation marks and citation omitted). Where, as here, the allegedly tortious conduct did not occur in WMATA's performance of a *quintessentially* governmental function, the D.C. Circuit looks to the case law interpreting the FTCA's discretionary function exception to decide whether the conduct occurred in the performance of a governmental function or a proprietary function. *Id.* Following the D.C.

Circuit, the panel majority in this case held that "all 'discretionary' activities of a governmental entity under the FTCA constitute 'governmental' activities" for purposes of differentiating between governmental and proprietary functions under the WMATA Compact. [Apx. 6a.]

To fully understand the ramifications of this holding, it is necessary to review two of this Court's recent decisions interpreting the FTCA's discretionary function exception. In *Berkovitz v. United States*, 486 U.S. 531 (1988), this Court created a two-part test for applying the exception. The first inquiry is whether the action complained of "involves an element of judgment or choice" (in which case there is discretion), or whether a statute, regulation, or policy prescribes a specific course of action (in which case there is no discretion). *Id.* at 536. If the conduct at issue is discretionary, the second inquiry is whether the judgment involved is "of the kind that the discretionary function exception was designed to shield." *Id.* The exception protects only decisions "grounded in social, economic, [or] political policy." *Id.* at 537 (internal quotation marks and citation omitted).

Most government decisions involve at least some element of choice. Accordingly, courts applying the *Berkovitz* test frequently had to determine whether a government decision was sufficiently policy-based to deserve the protection of the discretionary function exception. *See* Apx. 20a and cases cited therein. *Gaubert*, however, rejected many of the lower court's limitations on the scope of the discretionary function exception by holding that even operational decisions by relatively low-level employees can be sufficiently grounded in social, economic, or political policy for purposes of the discretionary function exception. *Gaubert*, 499 U.S. at 325-26. *Gaubert* further held that the discretionary function exception applies without any showing that a government employee actually considered policy objectives in making the challenged decision: "The focus of the inquiry is not on the agent's subjective intent in exercising the discretion conferred by statute or regulation, but on the nature of the actions taken and whether they are *susceptible to policy analysis*." *Id.*, 499 U.S. at 325 (emphasis supplied).

See also Baum v. United States, 986 F.2d 716, 721 (4th Cir. 1993) (characterizing as "largely irrelevant," for purposes of applying the discretionary function exception, the existence of record evidence that a government agent actually engaged in a policy-based deliberative process); *Shansky v. United States*, 164 F.3d 688, 692 (1st Cir. 1999) (framing the inquiry as "whether some *plausible* policy justification *could have* undergirded the challenged conduct") (emphasis supplied). *But cf. Cestonaro v. United States*, 211 F.3d 749, 756 n.5 (3rd Cir. 2000), *citing National Union Fire Ins. v. United States*, 115 F.3d 1415, 1417 (9th Cir. 1997) (placing the burden of proving applicability of the discretionary function exception on the party asserting governmental immunity); 14 Wright & Miller, *Federal Practice and Procedure* § 3658.1 at 639 (3rd ed. 1998) ("Most courts have concluded that the burden of proving the applicability of the discretionary function exception falls upon the United States"); Deborah F. Buckman, Annotation, *Liability of United States for Failure to Warn...*, 169 A.L.R. Fed. 421, 432 (2001) (analogizing the discretionary function exception to an affirmative defense, and suggesting that "summary judgment will be denied wherever plaintiff's counsel can establish genuine issues of material fact as to whether particular government decisions flowed from choices grounded in social, economic, or political policy").

As Judge Michael noted in his concurring/dissenting opinion in this case, *Gaubert's* "susceptible to policy analysis" standard has significantly broadened the scope of the discretionary function exception, and "courts have had difficulty in placing any principled limits on the range of conduct that counts as grounded in social, economic, or political policy." [Apx. 21a (citations omitted).] One particularly fertile ground of dispute is whether decisions that can be seen as responsive solely to agency budget constraints should be deemed to be "grounded in economic policy" for purposes of the discretionary function exception. *See, e.g., Domme v. United States*, 61 F.3d 787, 793-94 (10th Cir. 1995) (Henry, J., concurring) (recognizing disagreement in the case law about whether government decisions should be treated as policy based simply because they implicate

economic considerations). Indeed, a number of Circuit Court judges have voiced concern that if government choices are immune simply because those choices *may have been* motivated by a desire to cut costs, the discretionary function exception will render the FTCA's waiver of sovereign immunity meaningless. *See, e.g., Cope v. Scott*, 45 F.3d 445, 449 (D.C. Cir. 1995) (observing that if any decision responsive to budgetary constraints counts as grounded in economic policy, the discretionary function exception would "swallow the FTCA's sweeping waiver of sovereign immunity"); *Domme, supra*, 61 F.3d at 795 (Henry, J., concurring) (observing that "unless courts routinely inquire as to whether government employees have the authority to make the sorts of decisions that result in injuring people, the fact that it is reasonable to view most government decisions as having economic implications could eviscerate" the FTCA).

The Fourth Circuit's decision in this case squarely aligns the Fourth Circuit with those Circuits that have been willing to treat decisions that, in hindsight, *may have been* motivated by a desire to reduce costs as decisions "grounded in economic policy" under *Gaubert* and *Berkovitz*. Indeed, in part III B of its opinion, the panel majority held that the discretionary function exception protects WMATA's decisions in this case because the decisions implicated WMATA's economic policy, "*i.e.*, whether it was more cost-effective to reassemble [Escalator No. 3] pending repair, or whether to wait until replacement parts arrived." [Apx. 22a.] Judge Michael correctly characterized this holding as "remarkable:"

> ....As any first-year law student knows, the basic approach to negligence law outlined by Judge Learned Hand in *United States v. Carroll Towing Co.*, 159 F.2d 169 (2nd Cir. 1947), essentially defines negligence as the unreasonable balancing of the cost of safety measures against the risk of accidents.... Even on the most charitable interpretation of the facts, this is exactly the sort of balancing that was going on when [WMATA] decided not to reassemble the steps on Escalator Three.... If

this sort of balancing is immune from judicial review, the discretionary function exception has eclipsed the FTCA's basic goal of making the government liable for tort claims "under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the [tortious] act or omission occurred." 28 U.S.C. § 1346(b)(1).

The majority's holding in part III B is all the more striking because ... the majority pays no attention to the actual processes that led to the decision not to reassemble Escalator Three. The summary judgment record contains no evidence that anyone consciously weighed the costs in time and labor of reassembling Escalator Three versus the benefits in increased passenger safety and convenience. The record does not indicate who made the decision. Indeed, the record does not even indicate who had the authority to make the decision. Viewing the evidence in the light most favorable to [the Decedent's] family and estate, a reasonable jury could conclude that the decision not to reassemble Escalator Three was made by the escalator repair crew without any significant consultation with supervisory officials and that the repair crew neither sought to balance competing policy considerations nor had the authority to do so.... *Cf. Domme*, 61 F.3d at 795 (Henry, J., concurring) ("[A] nonmanagerial employee who, away from the quiet and measured reflection of a budget meeting, decides to compromise safety in order to save government resources may simply be trying to make his or her job easier rather than trying to serve the common good."). If the decision not to reassemble

> Escalator Three counts as a judgment grounded in the economic policy of [WMATA], the discretionary function exception truly has swallowed up the FTCA's waiver of immunity because there are precious few governmental decisions that cannot be seen as an effort to save costs. *See Cope*, 45 F.3d at 449 (noting that after government counsel had argued that any decision implicating budgetary concerns should fall within the discretionary function exception, counsel failed during oral argument to provide "even one example of a discretionary decision that would not be exempt for failure to implicate policy concerns" aside from the standard example that the discretionary function exception does not cover the negligent operation of motor vehicles by government employees). Consequently, the upshot of the majority's approach to the discretionary function exception is that the government will nearly always be immune for its actions so long as it has not enacted regulations that completely eliminate the discretion of its employees. [Apx. 22a-24a (footnote omitted).]

Judge Michael suggests – and this Court should consider – that if a correct application of the *Gaubert* standard leads to a determination that WMATA is completely immune from liability under the facts of this case, "this only highlights the shortcomings of that standard and provides a significant reason to consider using a different standard to interpret the [WMATA] Compact." *Id.* at 25a. As Judge Michael cogently stated, "sometimes government decisions requiring tradeoffs between cost and safety deserve the protection of the discretionary function exception, and sometimes they do not." *Id.* at 25a-26a. For purposes of this case, WMATA's decisions – the decision not to reassemble Escalator No. 3, the decision to transform Escalator No. 1 into a stationary walker, and the decision not to alert train

passengers of the situation at the Bethesda Station before their arrival – may very well have been nothing more than "the thoughtless failure of low-level employees to take certain safety precautions," the type of failure "that ought not to be protected by the discretionary function exception simply because the failure could be rationalized as an effort to save government dollars." *Id.* at 26a. Indeed, "whether the discretionary function exception's protection is warranted depends at least in part on the process by which government decisions are made." *Id.*, *citing Gaubert*, 499 U.S. at 335 (Scalia, J., concurring in part and concurring in the judgment in part) (suggesting that "the level at which the decision is made is often relevant to the discretionary function inquiry, since the answer to that inquiry turns on both the subject matter [of the decision] and the office of the decision maker").

If instead of applying the *Gaubert* standard, this Court views § 80 of the WMATA Compact literally and applies the distinction between governmental and proprietary activities, WMATA's operation of its escalators "would surely be classified as proprietary" and any negligence in the operation thereof would not be protected under the cloak of immunity. *Id.* at 27a, *citing Wainwright v. WMATA*, 958 F.Supp. 6, 9 (D.D.C. 1997). Likewise, if the Court views § 80 as drawing a distinction between planning and operational activities, "surely the actions of [WMATA] in this case fall on the operational side of the line." *Id.*, *citing Dant v. District of Columbia*, 829 F.2d 69, 74-75 (D.C. Cir. 1987). And, as discussed in more detail, *infra*, if the Court views § 80 along the lines suggested by Justice Scalia's concurrence in *Gaubert*, WMATA would not be entitled to summary judgment on its claim of immunity in this case "because a reasonable jury could conclude that the allegedly negligent decisions in this case were not made by any person who had the authority to make judgments based on social, economic or political policy." *Id.* at 27a-28a, *citing Gaubert*, 499 U.S. at 335.[7]

---

[7] Even assuming *Gaubert* is the proper standard for determining the extent of WMATA's immunity, and even assuming *some* of WMATA's decisions in

This Court should conclude, as did Judge Michael, that the D.C. and Fourth Circuits' approach to the governmental function exception set forth in § 80 of the WMATA Compact "is inconsistent with the intent of the [WMATA] Compact's framers...." *Id.* at 28a. Indeed, had the framers of the WMATA Compact intended the governmental/proprietary distinction in § 80 of the Compact to be governed by the discretionary function exception to the FTCA set forth in 28 U.S.C. § 2680(a), the Compact's framers likely would have differentiated between "ministerial" and "discretionary" acts. Instead, the framers differentiated between "proprietary" and "governmental" functions –the traditional language of municipal immunity. *See* 18 Eugene McQuillan, *The Law of Municipal Corporations*, § 53.02.05 (3d ed. 1993) (explaining that the distinction between proprietary and governmental functions is the oldest approach to the law of municipal immunity).

It is extremely unlikely that the framers of the WMATA Compact would have imagined in 1966 the extent of the FTCA's discretionary function exception as interpreted by this Court's *Gaubert* decision some 25 years later. Consequently, there is no reason to believe that the framers

---

this case are protected by the discretionary function exception – *e.g.*, designing the means of egress from the Bethesda Station and the decision to maintain those means of egress – WMATA must still be held accountable for any negligence in the ministerial implementation of those decisions. *See, e.g., Hurd v. United States*, 134 F.Supp.2d 745, 748-49 (D.S.C. 2001) (the government cannot be held liable under the discretionary function exception for the decision whether or not to act, but once the decision to act has been made, the government can be held liable for the failure to exercise due care in the execution of the chosen course of action); *Brotman v. United States*, 111 F.Supp.2d 418, 425 (S.D.N.Y. 2000) (holding that the discretionary function exception immunizes the National Park Service's decision to maintain the historic lighting conditions in the Statute of Liberty, but recognizing that the NPS could be liable "if the lights the NPS chose to install were turned off, broken or malfunctioning at the time and location" of the plaintiff's fall); *Fleming v. United States*, 69 F.Supp.2d 837, 841 (W.D.Va. 1999) (failure to warn of dangerous condition was not conduct involving the exercise of policy judgment; case governed instead by cases holding that once a protected policy-based decision has been made, the government must proceed with due care in the implementation of that decision).

would have intended that the governmental function exception in § 80 be construed to the same extent. *See* Apx. 28a-30a, 33a (Judge Michael's thorough discussion of why he believes the D.C. Circuit initially erred in deciding that *Gaubert* provides the proper standard for defining the extent of WMATA's immunity, leading to his conclusion that "the price of intercircuit consistency on this issue is the gutting of the Compact's waiver of sovereign immunity").

A far better approach to analyzing governmental function immunity under § 80 – and one more consistent with the intent of the Compact's framers – would be the approach suggested by Justice Scalia in his *Gaubert* concurrence: a challenged decision should be shielded from liability under § 80 if the decision is, "under the particular circumstances, one that ought to be informed by considerations of social, economic or political policy *and* is made by an officer whose official responsibilities include assessment of those considerations." *Gaubert*, 499 U.S. at 355 (Scalia, J., concurring in part and concurring in the judgment) (emphasis supplied).[8] Under the approach suggested by Justice Scalia, WMATA has not established its immunity on any of the theories of negligence that initially survived summary judgment in the District Court because WMATA has produced no evidence that anyone whose official responsibilities include the assessment of social, economic or political policy made the challenged decisions at issue in this case.

---

[8] As Judge Michael noted in his concurring/dissenting opinion, "[s]ome commentators have suggested that the best approach to government immunity would go farther than Justice Scalia's *Gaubert* concurrence by requiring not only that decisionmakers have the authority to make policy judgments, but also that the decisionmakers *actually consider* policy variables in making those judgments." [Apx. 36a, n.4. (citation omitted).]

CONCLUSION

The Fourth Circuit's holding in this case is contrary to the intent of the WMATA Compact's framers and broadens WMATA's cloak of immunity to cover virtually any decision that, *in hindsight*, can be said to have had even the slightest economic consequences. While WMATA's mission may be to provide safe and efficient public transportation for the residents of the Washington metropolitan area and the visitors to our nation's capital, not every action of every WMATA employee is taken with that ultimate goal in mind. In the instant case, it is an absolute fiction that *any* policy-based analysis occurred with regard to the conduct at issue, much less by someone with the authority to engage in such an analysis. To ignore that fiction in this case will enable WMATA to continue to hide behind the cloak of immunity rather than take responsibility for the negligent actions of its agents. Area residents and visitors expect – and deserve – more. Accordingly, this Court should take this opportunity to limit the governmental function exception set forth in § 80 of the WMATA Compact to the extent intended by the Compact's framers.

WHEREFORE, for the foregoing reasons, Petitioners respectfully request this Court grant this Petition and issue a writ of certiorari to the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

Jack A. Gold
Counsel of Record
Karp, Frosh, Lapidus,
Wigodsky & Norwind, P.A.
1133 Connecticut Ave., N.W.
Suite 250
Washington, DC 20036
(202) 822-3777
Attorneys for Petitioners

(Any footnotes trail end of each document)

No. 01-1345

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

RICHARD LEE SMITH, Individually and as Personal Representative of the Estate of Richard Hadaway Smith, Deceased; NANCY G. SMITH, Individually and as Personal Representative of the Estate of Richard Hadaway Smith, Deceased,
Plaintiffs-Appellees,

v.

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY,
Defendant-Appellant.

November 2, 2001, Argued

May 10, 2002, Decided

COUNSEL:
ARGUED: David R. Keyser, Assistant General Counsel, WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY, Washington, D.C., for Appellant.

Jack Arthur Gold, KARP, FROSH, LAPIDUS, WIGODSKY & NORWIND, P.A., Washington, D.C., for Appellees.

ON BRIEF: Cheryl C. Burke, General Counsel, Robert J. Kniaz, Deputy General Counsel, Gerard J. Stief, Associate General Counsel, WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY, Washington, D.C., for Appellant.

Lawrence S. Lapidus, KARP, FROSH, LAPIDUS, WIGODSKY & NORWIND, P.A., Washington, D.C., for Appellees.

JUDGES:
Before MICHAEL, KING, and GREGORY, Circuit Judges. Judge King wrote the opinion, in which Judge Gregory joined. Judge Michael wrote an opinion concurring in part and dissenting in part.

OPINION BY:
King

OPINION:

KING, Circuit Judge:

In July 1999, the parents of Richard Hadaway Smith, individually and as representatives of his estate, initiated this proceeding against the Washington Metropolitan Area Transit Authority (the "METRO") in the District of Maryland, seeking damages for the death of their son. In response, the METRO asserted governmental immunity and, upon the court's partial denial of its immunity claim, noticed an interlocutory appeal. Because the METRO is entitled to a broader grant of immunity than that accorded it by the district court, we vacate and remand.

I.

A.

On the afternoon of July 20, 1998, at the METRO's Bethesda station in Maryland, Smith climbed an escalator which was being utilized as a stairway, i.e., a "stationary walker."[1] At the top of the escalator, Smith suffered a fatal heart attack. The METRO had decided to utilize the escalator as a stationary walker on that occasion because the two other escalators at its Bethesda station were inoperative.

Public access to the Bethesda station is normally provided by three escalators and an elevator. By design, each of the three escalators is capable of being operated either up or down, and the direction of each escalator can be altered by METRO officials on the basis of need. On July 8, 1998, twelve days before Smith's tragic death, one of the escalators at the Bethesda station ("Escalator Two") had failed an inspection

by Maryland safety inspectors. A safety inspector thereafter refused to allow the METRO to utilize Escalator Two as a stationary walker, and it was inoperative on July 20, 1998. On the night of July 19, 1998, while the Bethesda station was closed, a second escalator ("Escalator Three") was being subjected to routine maintenance when METRO mechanics discovered a problem necessitating its repair. This problem rendered Escalator Three potentially unsafe for the METRO to operate, and on July 20, 1998, Escalator Three was in a state of disassembly awaiting a replacement part.

As a result of the inoperative status of Escalators Two and Three, the METRO made the decision to utilize its sole operating escalator ("Escalator One") as a stationary walker, thus enabling its patrons to both enter and exit the Bethesda station by a means other than the single elevator. Smith's fatal heart attack occurred at approximately 3:15 p.m. on July 20, 1998.[2]

B.

This proceeding was initially filed in the district court on July 22, 1999, alleging that, due to its negligence, the METRO is liable for Smith's death. An amended complaint, filed August 15, 2000, consisted of two counts, each premised on the same allegation of negligence: one for wrongful death, made on behalf of Smith's parents, plus a second count under the Maryland survival statute, asserted on behalf of Smith's estate.[3]

In response to this allegation, the METRO sought summary judgment on the basis of multiple contentions, including the immunity claim now on appeal. The development of the case in district court revealed that Smith's negligence allegation concerning the Bethesda station embodied five theories, as follows:

1. The METRO had negligently braked Escalator One for use as a stationary walker;

2. The METRO had negligently left Escalator Three disassembled pending repair;

3. The METRO had negligently failed to warn its Bethesda patrons of the conditions on July 20, 1998;

4. The METRO's signage and illumination (the alleged "design defects") failed to comply with the requirements of the ANSI Code;[4]

5. The METRO had negligently failed to repair and maintain Escalators Two and Three.

Upon its consideration of the METRO's summary judgment request, and the assertions and related submissions of the parties on the legal and factual issues relating thereto, the district court declined to resolve the case fully in favor of the METRO. *Smith v. Washington Metro. Area Transit Auth., 133 F. Supp. 2d 395 (D. Md. 2001)* (the "Opinion"). It concluded, inter alia, that the METRO's alleged failure to repair and maintain its escalators was not within its immunity protection. The court determined, however, that the METRO was entitled to immunity for the design of signage and illumination at its Bethesda station, which was alleged to violate the ANSI Code. The court also ruled in favor of the METRO on what it called the "alleged statutory violations" because Smith had failed to forecast sufficient evidence to warrant the conclusion that violations of the ANSI Code had proximately caused his death. The METRO has appealed the court's decision declining to fully recognize its immunity claim in this case.

C.

It is settled that the denial of an immunity claim by a district court constitutes an appealable interlocutory decision. *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc., 506 U.S. 139, 144, 121 L. Ed. 2d 605, 113 S. Ct. 684 (1993); KiSKA Constr. Corp. v. WMATA, 334 U.S. App. D.C. 371, 167 F.3d 608, 610-11 (D.C. Cir. 1999).* In this case, the court partially rejected the METRO's immunity

claim, and "when the 'defendant raises and the district court rejects immunity as a defense, the defendant enjoys the right of immediate appeal.'" *KiSKA, 167 F.3d at 610* (quoting *Rendall-Speranza v. Nassim, 323 U.S. App. D.C. 280, 107 F.3d 913, 916 (D.C. Cir. 1997)).*

To the extent the METRO's complained-of actions fall within its cloak of immunity, we lack subject matter jurisdiction over such claims. *See, e.g., Medina v. United States, 259 F.3d 220, 223 (4th Cir. 2001).* In 1995, we observed that an assertion of governmental immunity is properly addressed under the provisions of Rule 12(b)(1) of the Federal Rules of Civil Procedure.[5] *Williams v. United States, 50 F.3d 299, 304 (4th Cir. 1995).* As we noted, if the governmental entity challenges jurisdiction under Rule 12(b)(1), the plaintiff bears the burden of persuasion, and the court is free to consider exhibits outside the pleadings "to resolve factual disputes concerning jurisdiction." *Id.*

In this instance, the district court partially denied the METRO's immunity claim, thereby deciding that it possessed subject matter jurisdiction over Smith's causes of action. On interlocutory review of such an immunity denial, we do not decide whether a plaintiff can prove his claim at trial. Rather, we must examine whether any material jurisdictional fact is in dispute, and if not, whether the governmental entity "is entitled to prevail as a matter of law" due to our lack of jurisdiction. *Richmond, Fredericksburg & Potomac R.R. Co. v. United States, 945 F.2d 765, 769 (4th Cir. 1991).*

II.

A.

In order to properly assess the METRO's claim of immunity, it is necessary to first understand certain legal principles governing the METRO's operations. First of all, the METRO Compact (the "Compact") was executed in 1966 by the State of Maryland, the Commonwealth of Virginia, and the District of Columbia, creating an independent entity to operate a mass transit system in and about the District of Columbia. Congress specifically consented to the Compact, and any legal issues relating to its interpretation are federal

questions. *Cuyler v. Adams, 449 U.S. 433, 438, 66 L. Ed. 2d 641, 101 S. Ct. 703 (1981); Morris v. WMATA, 251 U.S. App. D.C. 42, 781 F.2d 218, 220 (D.C. Cir. 1986).*

As a general proposition, multistate entities such as the METRO are not accorded governmental immunity absent some "good reason to believe" that immunity was intended to be conferred upon them. *Morris, 781 F.2d at 224* (quoting *Lake Country Estates v. Tahoe Reg'l Planning Agency, 440 U.S. 391, 401, 59 L. Ed. 2d 401, 99 S. Ct. 1171 (1979)).* The Compact, however, evinces the clear intent of its signatories to effect such a conferral. *Morris, 781 F.2d at 220.* Pursuant to its Section 80, the METRO has waived immunity in certain circumstances, i.e., when it is engaged in proprietary functions, while specifically preserving its immunity for "torts occurring in the performance of a governmental function."[6]

B.

As a threshold question, we must examine the legal framework to be utilized in assessing the immunity issue. While we have previously applied the traditional "governmental/proprietary" distinction to the METRO, we have also recognized the difficulty in determining when a particular function is a proprietary one.[7] *Martin v. WMATA, 667 F.2d 435, 436 (4th Cir. 1981).* In analyzing this distinction, the Court of Appeals for the District of Columbia has utilized the "discretionary/ministerial" dichotomy employed by the Federal Tort Claims Act ("FTCA").[8] *See, e.g., Sanders v. WMATA, 260 U.S. App. D.C. 359, 819 F.2d 1151, 1155 (D.C. Cir. 1987).*

Although these two tests – "governmental/proprietary" and "discretionary/ministerial" – are not coterminous, the discretionary acts of public officials are recognized as being within a "subset of governmental functions." *819 F.2d at 1155 n.9.* In essence, all "discretionary" activities of a governmental entity under the FTCA constitute "governmental" activities within the meaning of the "governmental/proprietary" test. Therefore, the legal principles developed under the FTCA are a useful analytical tool for identifying the scope of the METRO's immunity.

The Supreme Court long ago characterized the FTCA as distinguishing between "acts of a governmental nature or function," which remain immune, and ministerial functions resulting in "ordinary common-law torts," as to which the FTCA has waived governmental immunity. *Dalehite v. United States, 346 U.S. 15, 28, 97 L. Ed. 1427, 73 S. Ct. 956 (1953).* Thirteen years after the Supreme Court's decision in *Dalehite* enunciated the distinction between discretionary and ministerial functions, the Compact came into existence. The Compact "accepted the *Dalehite* conception" and, as the FTCA does for the federal government, provided that the METRO is not liable for torts occurring in the performance of a governmental function. *Sanders, 819 F.2d at 1155.* Because of the FTCA's similarity to Section 80 in provisions and purpose, we agree with the Court of Appeals for the District of Columbia that it is appropriate for us to analogize the immunity aspects of the Compact to the principles developed under the FTCA.[9] Applying this rationale, we will analyze the METRO's immunity claim in this case on the basis of the FTCA's legal principles.

C.

Our sister circuit in the seat of Government, which often addresses issues on the METRO Compact, has developed two alternate tests to assist in the identification of "governmental" functions under the Compact. *Burkhart v. WMATA, 324 U.S. App. D.C. 241, 112 F.3d 1207, 1216 (D.C. Cir. 1997).* First, that court has recognized that if the METRO is engaged in a quintessential governmental function, its activities fall within the scope of its immunity. *Id.* If the METRO is not engaged in such a governmental function, however, a court must proceed to the second inquiry, and it must determine whether the challenged activity is discretionary or ministerial, the dichotomy employed by the FTCA. *Id.*

If the challenged activity is discretionary in nature, it falls within what has long been called the "discretionary function exception."[10] *Coates v. United States, 181 F.2d 816, 817 (8th Cir. 1950).* Under the discretionary function exception, the METRO is immune from any claim, "however negligently caused, that affect[s] the governmental functions."[11] *Dalehite,*

346 U.S. at 32. A ministerial activity of the government, on the other hand, "connotes the execution of policy as distinct from its formulation," *Griggs v. WMATA, 344 U.S. App. D.C. 28, 232 F.3d 917, 921 (D.C. Cir. 2000)*, and such activities are not accorded immunity protection.

Most significantly in the context of this case, the Supreme Court, in 1991, made clear in *United States v. Gaubert* that discretionary acts deserving of immunity are not limited to policymaking or planning decisions; day-to-day management can also involve discretionary choices grounded in regulatory policy. *499 U.S. 315, 325 (1991).* It is now settled that the day-to-day operational decisions of government are entitled to immunity under the FTCA so long as the choices are "susceptible to policy analysis." *Id. at 325.*

In order to determine whether an act or omission is a discretionary one – and therefore immune – we first assess whether an official or employee exercised "due care in carrying out statutes or regulations whether valid or not." *Dalehite, 346 U.S. at 33.* As the Supreme Court has framed it, "conduct cannot be discretionary unless it involves an element of judgment or choice." *Berkovitz v. United States, 486 U.S. 531, 536, 100 L. Ed. 2d 531, 108 S. Ct. 1954 (1988).* And the analysis does not end there, for even if "the challenged conduct involves an element of judgment, a court must determine whether that judgment is of the kind that the discretionary function exception was designed to shield," that is, decisions "grounded in social, economic, and political policy." *Id. at 537; Dalehite, 346 U.S. at 36* ("Where there is room for policy judgment and decision there is discretion.").

When a public employee makes a discretionary judgment in performing governmental duties, that judgment is entitled to immunity from liability "whether or not the discretion involved be abused." *Dalehite, 346 U.S. at 33; see also Souders v. WMATA, 310 U.S. App. D.C. 370, 48 F.3d 546, 550 (D.C. Cir. 1995)* ("The hard fact remains that insulating policy determinations, good and bad, is the raison d'etre of the discretionary function exception."). As a reviewing court, we are not to inquire whether policy considerations *were actually* contemplated in making a decision. On the contrary,

"a reviewing court in the usual case is to look to the nature of the challenged decision in an objective, or general sense, and ask whether that decision is one which we would expect inherently to be grounded in considerations of policy." *Baum v. United States, 986 F.2d 716, 720-21 (4th Cir. 1993).* If a governmental decision is susceptible to policy analysis and if, as Justice White stated, it is "grounded in the social, economic, or political goals of the statute and regulations," that decision is entitled to immunity protection. *Gaubert, 499 U.S. at 323.*

III.

Given this framework, we turn to the theories of negligence asserted against the METRO by Smith. *See supra* at 4. Because there are no issues of material fact bearing on the immunity claim of the METRO in this case, we will apply the legal principles enunciated above, particularly the Court's explication of the discretionary function exception in *United States v. Gaubert*, and assess whether, and to what extent, the METRO's immunity claim must be recognized.

A.

Faced with what plainly constituted an emergency situation at the Bethesda station on July 20, 1998, the METRO determined that it should shut down Escalator One and utilize it as a stationary walker.[12] There being no statutory or regulatory mandate specifically governing the METRO's actions in response to that situation, the METRO personnel at the Bethesda station were forced to make difficult choices. For example, with two of their three escalators out of service, they could (a) stop Escalator One and allow METRO patrons to both enter and exit the Bethesda station by using it as a stationary walker, or (b) operate Escalator One up or down, compelling all patrons moving in the *other* direction to use the elevator.[13]

There were potential economic and political costs to the METRO in choosing between such unattractive resolutions of its problem. For instance, its decision, however made, might well have resulted in public outrage, adverse media coverage, or political fallout. A decision to permit entering and exiting

METRO passengers to choose between walking on a stationary escalator or riding an elevator, rather than compelling the passengers moving in one direction to use the elevator, is plainly a decision "susceptible to policy judgment," and it involves the "exercise of 'political, social, or economic judgment.'" *Cope v. Scott, 310 U.S. App. D.C. 144, 45 F.3d 445, 448 (D.C. Cir. 1995)* (quoting *Gaubert, 499 U.S. at 325); Baum v. United States, 986 F.2d 716, 721 (4th Cir. 1993)* (noting that discretionary decision is "one which we would expect inherently to be grounded in considerations of policy," and is subject to "well-established presumption that public officials have properly discharged their official duties"). Indeed, the choices presented with respect to operations at the Bethesda station on July 20, 1998, implicated the METRO's mission – public transportation – and its ability to fulfill that mission in a safe and efficient manner. In sum, the choices confronting the METRO at Bethesda on July 20 involved, as the Court of Appeals for the District of Columbia astutely put it, "not negligence but social wisdom, not due care but political practicability, not reasonableness but economic expediency." *Cope, 45 F.3d at 450* (quoting *Sami v. United States, 199 U.S. App. D.C. 173, 617 F.2d 755, 766 (D.C. Cir. 1979)).*

The METRO officials at the Bethesda station on July 20, 1998, acted precisely as they were bound to act. They responded to the situation in a manner that implicated both their mission and public policy, and they decided to shut down Escalator One and use it as a stationary walker. This governmental decision was plainly of the discretionary variety, and it is entitled to be accorded immunity protection.

B.

The METRO's decision not to reassemble Escalator Three for use during rush hour on July 20, 1998, is also a governmental decision shielded by the discretionary function exception. That decision is "susceptible to policy analysis," *Gaubert, 499 U.S. at 325*, and it involved the exercise of economic policy judgment. *Id. at 323.* There being no specific statutory or regulatory mandate for the METRO to reassemble Escalator Three, the potential choices implicated

the economic policy of the METRO, i.e., whether it was more cost-effective to reassemble Escalator Three pending repair, or whether to wait until replacement parts arrived. Even if this decision had been incorrect, and even if it had constituted an abuse of discretion, it is, under the circumstances, deserving of immunity protection. *Dalehite v. United States, 346 U.S. 15, 33, 97 L. Ed. 1427, 73 S. Ct. 956 (1953).*

C.

In the face of the situation at the Bethesda station on July 20, 1998, the METRO is also immune for its alleged failure to properly warn its Bethesda patrons of the inoperative status of Escalators Two and Three. *Rosebush v. United States, 119 F.3d 438, 443 (6th Cir. 1997)* ("Decisions concerning the proper response to hazards are protected from tort liability by the discretionary function exception."); *see also Williams v. United States, 50 F.3d 299, 310 (4th Cir. 1995).* In this connection, we assess only the METRO's asserted failure to warn Smith of the emergency situation on July 20, i.e., its failure to post temporary signs or personnel at the Bethesda station advising its patrons of the inoperative escalators and the location of the elevator.

As with its decisions on the utilization of Escalator One as a stationary walker and to delay reassembly of Escalator Three pending the arrival of replacement parts, no specific statute or regulation mandated any certain course of action by the METRO. Importantly, any hazardous condition present on that occasion was obvious, and where "the danger is not hidden, there is no duty to warn." *Rich v. United States, 119 F.3d 447, 452 (6th Cir. 1997).* For example, the long line of patrons waiting to use the elevator at the Bethesda station indicated both where it was located and that it was functional. And even after Smith's arrival at the Bethesda station, when he became aware of any existing hazard, he had other available options. He could have waited for the elevator, or he could have decided to board another METRO train and depart the station. The METRO is entitled to be accorded immunity from a negligence claim in this situation, because, as the Sixth Circuit has held, "any duty to warn of

this open and obvious hazard is discretionary and exempt from an action in tort." *Id.*

D.

In its Opinion, the district court ruled in favor of the METRO on Smith's fourth theory of negligence, i.e., the failure of its signage and illumination to comply with the requirements of the ANSI Code. *See supra* at 4. The court concluded that the METRO is immune from any theory of negligence based on the assertion that its permanent signage and illumination failed to comply with the law, because the METRO is immune from challenges to the design of its stations.[14] Opinion at 17 n.2; *133 F. Supp. 2d at 406 n.2.* As a result of this ruling by the district court, the theory of design defect is not before us in this appeal.

E.

Finally, Smith contends that the METRO negligently failed to repair and maintain Escalators Two and Three at the Bethesda station, and that such failure proximately caused his death. In addressing this contention, we first observe that the issue of whether this negligence theory is properly on appeal is somewhat problematic. In its Opinion, the district court broadly observed that there was a lack of proximate cause between the "statutory violations" and Smith's heart attack. Specifically, it determined that "plaintiffs have not sustained their burden to show that the injury suffered by their son was of the kind contemplated by the legislature in adopting the [ANSI] Code. Therefore, as a matter of law, Plaintiffs have not shown the alleged statutory violations proximately caused their son's death." Opinion at 15; *133 F. Supp. 2d at 404.* This conclusion indicates that the court contemplated awarding summary judgment to the METRO, on the basis of lack of proximate cause, with respect to alleged violations of the ANSI Code.[15] If such was the case, then there would be nothing for us to address on interlocutory appeal of this negligence theory, because the METRO would have already prevailed on the merits. However, the court also observed that "the heart of Plaintiff's complaint is the failure to repair and maintain the primary means of ingress and egress from the station's premises," and

that "this conduct does not fall within the scope of [METRO's] immunity." *Id.* at 20. In the context of these conflicting statements, the breadth of the court's assessment of proximate cause is sufficiently vague to warrant that its scope should be defined by the district court.

For the purposes of the METRO's interlocutory appeal, however, we possess jurisdiction only with respect to its claim of immunity. To the extent that the METRO's repair and maintenance of Escalators Two and Three contravened applicable requirements of the ANSI Code, such repair and maintenance would not involve "an element of judgment or choice," and it would therefore fall outside the discretionary function exception.[16] *Berkovitz, 486 U.S. at 536.* In such a circumstance, the METRO would not be entitled to immunity on this theory of negligence.

On remand, the district court should first accord the METRO the immunity to which it is entitled. Then, if necessary, it can decide whether Smith can make a prima facie showing of negligent repair and maintenance, and it can also assess whether there is a sufficient proximate cause nexus between such a showing and Smith's death. The district court should then determine whether anything is left of this case.

IV.

In summary, we conclude that the METRO is entitled to be accorded immunity under the discretionary function exception for its decisions at the Bethesda station on July 20, 1998: (1) to brake Escalator One and utilize it as a stationary walker; (2) to leave Escalator Three disassembled; and (3) to provide no specific warning to its patrons of the situation at the station. We therefore vacate the partial denial of the METRO's claim of immunity, and we remand for any further proceedings that may be appropriate.

VACATED AND REMANDED

Footnotes

n1 A "stationary walker" is an escalator at a METRO station that has been braked and stopped in a stationary

position and has been placed in use as a stairway. Patrons of the METRO are then permitted to walk up or down the stationary walker.

n2 At the time of his death, Smith was a 37-year-old obese male. Although apparently unaware of his condition, he suffered from severe coronary atherosclerosis, with a 70% to 90% blockage of the arteries surrounding his heart. In 1994, Smith was diagnosed with high cholesterol, but he had rejected his doctor's recommendations for ameliorating this condition.

n3 We refer in this opinion to the plaintiffs collectively, including the decedent, as "Smith."

n4 The American National Standards Institute (ANSI) promulgates a Safety Code for Elevators and Escalators. The ANSI Code is developed by the American Society of Mechanical Engineers, and it is published after approval by ANSI as an American National Standard. Maryland law requires that all escalators be maintained in accordance with the ANSI Code. Md. Ann. Code art. 89, § 49B(d) (1998 Repl. Vol.).

n5 Pursuant to Rule 12(b)(1), the defense of "lack of jurisdiction over the subject matter" may be asserted by motion at the option of the pleader, rather than requiring it to be asserted in the responsive pleading. Only a motion under Rule 12(b)(6) will be treated as one for summary judgment, and then only if "matters outside the pleading are presented to and not excluded by the court."

n6 The parties to the Compact – Maryland, Virginia, and the District of Columbia – have each adopted Section 80, providing that:

> The Authority shall be liable for its contracts and for its torts and those of its directors, officers, employees and agents committed in the conduct of any proprietary function, in accordance with the law of the applicable signatory (including rules on conflict of laws), but *shall not be liable for any torts occurring*

> *in the performance of a governmental function.*

Md. Code Ann. Trans. § 10-204(80) (2000); Va. Code Ann. § 56-529, 530 (2001); D.C. Code Ann. § 9-1107.01 (2001) (emphasis added).

n7 The Supreme Court has determined, in a number of contexts, that the previously recognized "distinction between 'governmental' and 'proprietary' functions was untenable and must be abandoned." *Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 542, 83 L. Ed. 2d 1016, 105 S. Ct. 1005 (1985)* (citing cases). To illustrate the intended difference, however, operation of a police force is a quintessential "governmental function," *Morris, 781 F.2d at 220*, and the "design and planning of a transportation system" also falls into the "governmental" category. *McKethean v. WMATA, 588 A.2d 708, 713-14 (D.C. Ct. App. 1991)*. The provision of mass transportation by a public body, however, is generally recognized as a "proprietary" function. *Qasim v. WMATA, 455 A.2d 904, 906 (D.C. 1983)*.

n8 Pursuant to the FTCA, the Government has not waived its immunity as to

> any claim . . . based upon the exercise or performance or the failure to exercise or perform a *discretionary function or duty on the part of a federal agency or an employee of the Government*, whether or not the discretion involved be abused.

28 U.S.C. § 2680 (emphasis added).

n9 We recently recognized that a proper consideration in construing the Compact is the maintenance of consistency between the legal interpretations of the "two federal circuits most likely to hear cases in which [METRO] is a party," i.e., this Court and the Court of Appeals for the District of Columbia. *Lizzi v. Alexander, 255 F.3d 128, 134 (4th Cir. 2001)*.

n10 The term "discretionary function exception," standing alone, is somewhat misleading. It constitutes an exception to the waiver of immunity contained in the FTCA, meaning that if an activity of the METRO falls within the exception, it is entitled to be accorded governmental immunity. *See Williams v. United States, 50 F.3d 299, 304-05 (4th Cir. 1995).*

n11 A prime example of negligence *not* immune and for which the government is liable is "negligence in the operation of vehicles." *Dalehite, 346 U.S. at 29; see also United States v. Gaubert, 499 U.S. 315, 325 n.7, 113 L. Ed. 2d 335, 111 S. Ct. 1267 (1991)* ("Although driving requires the constant exercise of discretion, the official's decisions in exercising that discretion can hardly be said to be grounded in regulatory policy.").

n12 Regarding the first negligence theory, i.e., the METRO's decision to shut down Escalator One in order to use it as a stationary walker, the district court's statements seem unclear. On the one hand, it recognized that the ANSI Code did not prohibit the usage of the escalator as a walker; on the other hand, it also stated that "the opinion of the Chief Inspector as to the interpretation of the elevator and safety code provides a sufficient basis for establishing a statutory violation." Opinion at 14; *133 F. Supp. 2d at 404.* Regardless, the Opinion contemplates that the use of Escalator One as a walker is part of the outstanding and viable case against the METRO. As such, we must construe this negligence theory as having been resolved against the METRO and as being a viable issue on appeal.

n13 There may have been other options available to the METRO. For example, it could have shut down the Bethesda station entirely.

n14 While Smith also maintained that the permanent signage and illumination at the Bethesda station contravened the ANSI Code, the district court examined this contention carefully and ruled against him. It concluded that there was an insufficient nexus between, on the one hand, the harms the ANSI Code was designed to prevent and, on the other, any harm suffered by Smith. Specifically, the court

determined that "as a matter of law, Plaintiffs have not shown the alleged violations proximately caused their son's death, and an action for damages may not lie based upon the theory of a statutory violation." Opinion at 15; *133 F. Supp. 2d at 404.*

n15 Indeed, Smith's counsel stated at oral argument that if the METRO's decision to shut down Escalator One on July 20, 1998, is entitled to immunity, this is "the end to this case."

n16 Although the METRO is not generally governed by state law, the Compact requires that it comply with the "laws, rules, regulations and orders relating to inspection of equipment and facilities, safety and testing." Md. Code Ann. Trans. § *10-204 P 77 (1999)*. Violation of an applicable ANSI standard is evidence of negligence in Maryland. *Kent Village Assocs. Joint Venture v. Smith, 104 Md. App. 507, 657 A.2d 330, 337 (Md. Ct. Spec. App. 1995).*

CONCUR BY:
MICHAEL (In Part)

DISSENT BY:
MICHAEL (In Part)

DISSENT:

MICHAEL, Circuit Judge, concurring in part and dissenting in part:

The majority follows the D.C. Circuit by holding that the immunity for "governmental functions" conferred by section 80 of the METRO Compact is at least as broad as that conferred by the discretionary function exception, *28 U.S.C. § 2680*(a), to the Federal Tort Claims Act. As the D.C. Circuit explained in *Burkhart v. WMATA, 112 F.3d 1207, 1216-17 (D.C. Cir. 1997)*, this means that the METRO is immune from liability for any acts and omissions that are "susceptible to policy analysis" under the standard established by the Supreme Court in *United States v. Gaubert, 499 U.S. 315, 325, 113 L. Ed. 2d 335, 111 S. Ct. 1267 (1991)*. Applying the *Gaubert* standard, the majority concludes that the METRO is

entitled to immunity on all but one of the theories of negligence advanced by Richard H. Smith's family and estate. Most strikingly, the majority holds in part III B of its opinion that the METRO is immune from liability for its decision not to reassemble Escalator Three because that decision could have been based on a judgment that the costs of reassembling the escalator outweighed the safety benefits of reassembly. Because I cannot believe that the framers of the METRO Compact intended for the governmental function exception in section 80 to sweep so broadly, I must respectfully dissent from the majority's analysis.

The majority suggests that under *Gaubert* any decision that can be characterized as an effort to cut costs is "the kind of policy judgment that the discretionary function exception was designed to shield." *Id. at 332.* Remarkably, this extremely broad reading of the discretionary function exception appears to be consistent with our prior cases. Although there is something commendable in the majority's refusal to flinch from *Gaubert*'s implications, the majority's analysis makes it disturbingly clear that the discretionary function exception has in fact swallowed up the FTCA's ostensibly broad waiver of sovereign immunity. This means that the majority's initial decision to follow the D.C. Circuit comes at a heavy price: the price of maintaining consistency between our circuit and the D.C. Circuit is nothing less than evisceration of the waiver of sovereign immunity in section 80 of the METRO Compact. Because I think that price is too high, I dissent from the majority's decision in parts II B and C of its opinion to analyze the METRO's immunity by using *Gaubert*'s susceptible-to-policy-analysis standard. I would adopt a narrower view of the immunity conferred by section 80 of the METRO Compact by reading the governmental function exception along the lines suggested by Justice Scalia in his concurring opinion in *Gaubert*. Under that standard the METRO (as the district court concluded) has not established its immunity on any of the theories of negligence that survived the district court's summary judgment ruling. It follows that I also dissent from parts III A, B, and C of the majority opinion. I concur in the remainder of the opinion.

I will first explain why the majority's analysis allows the exception for governmental functions in section 80 of the METRO Compact to swallow up the Compact's general waiver of sovereign immunity. I then explain why the better course would be to analyze the governmental function exception using the standard suggested by Justice Scalia in his *Gaubert* concurrence. Finally, I explain how I would apply that standard to the claims before us.

I.

Section 80 of the METRO Compact provides that the METRO "shall be liable for its contracts and for its torts and those of its directors, officers, employees and agents committed in the conduct of any proprietary function . . . but shall not be liable for any torts occurring in the performance of a governmental function." As the majority explains, *ante* at 9, the D.C. Circuit has read section 80 to confer immunity on the METRO for all its "quintessential governmental functions," such as police activity. *Burkhart, 112 F.3d at 1216* (internal quotation marks and citation omitted). Where, as here, the allegedly tortious conduct did not occur in the METRO's performance of a quintessentially governmental function, the D.C. Circuit looks to the case law interpreting the discretionary function exception in the Federal Tort Claims Act (FTCA) to decide whether the conduct occurred in the performance of a governmental function or a proprietary function. *Id.* Following the D.C. Circuit, the majority today holds that "all 'discretionary' activities of a governmental entity under the FTCA constitute 'governmental' activities within the meaning of the 'governmental/proprietary' test." *Ante* at 8. To understand the consequences of this decision, it will be necessary to review briefly the Supreme Court's recent decisions interpreting the discretionary function exception.

The Supreme Court's decision in *Berkovitz v. United States, 486 U.S. 531, 100 L. Ed. 2d 531, 108 S. Ct. 1954 (1988)*, created a two-pronged test for applying the discretionary function exception. First, courts ask whether the governmental action complained of "involves an element of judgment or choice." *Id. at 536.* When a statute, regulation,

or policy prescribes a specific course of action, the negligent failure to follow that course is not protected by the discretionary function exception. *Id.* Second, if the challenged conduct is discretionary, courts then ask whether the judgment involved is "of the kind that the discretionary function exception was designed to shield." *Id.* The exception protects only decisions "grounded in social, economic, [or] political policy." *Id. at 537* (internal quotation marks and citation omitted).

Because most government decisions involve at least some degree of choice, courts applying the *Berkovitz* test have frequently had to decide whether a government decision was sufficiently policy based to deserve the protection of the discretionary function exception. Prior to the Court's 1991 decision in *Gaubert*, the case law interpreting the discretionary function exception suggested several possible limits on the range of government conduct that could be seen as grounded in social, economic, or political policy. *See, e.g., Gaubert v. United States, 885 F.2d 1284, 1289 (5th Cir. 1989)* (suggesting that decisions made at the operational rather than the planning level do not qualify as policy based under the second prong of *Berkovitz*), *rev'd sub nom. United States v. Gaubert, 499 U.S. 315, 113 L. Ed. 2d 335, 111 S. Ct. 1267 (1991); Dube v. Pittsburgh Corning, 870 F.2d 790, 797-800 (1st Cir. 1989)* (holding that the discretionary function exception does not apply when the government fails to make an actual policy judgment), *abrogation recognized by Shansky v. United States, 164 F.3d 688, 692 n.4 (1st Cir. 1999); Blessing v. United States, 447 F. Supp. 1160, 1184 (E.D. Pa. 1978)* (stating that the discretionary function exception should apply only if the official who made a challenged decision had the authority to make that decision). *Gaubert*, however, rejected these limitations on the scope of the discretionary function exception. First, *Gaubert* made clear that an operational decision by a relatively low-level employee can be grounded in social, economic, or political policy for purposes of the discretionary function exception. *Gaubert, 499 U.S. at 325-26.* Second, *Gaubert* held that the government may enjoy the protection of the discretionary function exception without

any showing that its employees actually considered policy goals in making the decisions alleged to be negligent: "The focus of the inquiry is not on the agent's subjective intent in exercising the discretion conferred by statute or regulation, but on the nature of the actions taken and on whether they are susceptible to policy analysis." *Id. at 325. See also Baum v. United States, 986 F.2d 716, 721 (4th Cir. 1993).* As the First Circuit has explained, the critical question after *Gaubert* is "whether some plausible policy justification *could have* undergirded the challenged conduct." *Shansky v. United States, 164 F.3d 688, 692 (1st Cir. 1999)* (emphasis added). Finally, the *Gaubert* majority apparently held that a governmental decision can be susceptible to policy analysis (and thus within the scope of the discretionary function exception) even if the decision was made by an employee who lacked the authority to consider matters of social, economic, or political policy.[1]

Gaubert's susceptible-to-policy analysis standard has significantly broadened the scope of the discretionary function exception. *See* Bruce A. Peterson and Mark E. Van Der Weide, *Susceptible to Faulty Analysis:* United States v. Gaubert *and the Resurrection of Federal Sovereign Immunity, 72 Notre Dame L. Rev. 447, 465-73 (1997)* (surveying the post-*Gaubert* case law and concluding that the government wins more cases, and wins them at earlier stages of litigation, after *Gaubert* than before). Because the *Gaubert* standard asks only whether allegedly negligent government conduct could have been based on policy judgments, courts have had difficulty in placing any principled limits on the range of conduct that counts as grounded in social, economic, or political policy.[2] *See Rosebush v. United States, 119 F.3d 438, 444-45 (6th Cir. 1997)* (Merritt, J., dissenting) (stating that the second prong of the *Berkovitz-Gaubert* test "presents an ambiguous standard that is difficult to apply and that has produced a large number of inconsistent holdings in the circuit and district courts"). One fertile ground of dispute has been the question of whether decisions that can be seen as responsive to agency budget constraints should count as "grounded in economic policy" for purposes of the discretionary function exception. *See*

Domme v. United States, 61 F.3d 787, 793-94 (10th Cir. 1995) (Henry, J., concurring) (recognizing disagreement in the case law about whether government decisions should be treated as policy based simply because they implicate economic considerations). Several judges have voiced concern that if government choices are immune simply because those choices could have been motivated by a desire to cut costs, the discretionary function exception will gut the FTCA's waiver of sovereign immunity. *See, e.g., Cope v. Scott, 310 U.S. App. D.C. 144, 45 F.3d 445, 449 (D.C. Cir. 1995)* (observing that if any decision responsive to budgetary constraints counts as grounded in economic policy, the discretionary function exception would "swallow the FTCA's sweeping waiver of sovereign immunity"); *Domme, 61 F.3d at 795* (Henry, J., concurring) (observing that "unless courts routinely inquire as to whether government employees have the authority to make the sorts of decisions that result in injuring people, the fact that it is reasonable to view most government decisions as having economic implications could eviscerate the Federal Tort Claims Act").

Today, the majority squarely aligns this circuit with those courts that have been willing to treat decisions that could have been motivated by a desire to reduce costs as grounded in economic policy under *Gaubert* and *Berkovitz*. In part III B of its opinion, the majority holds that the discretionary function exception protects the METRO's decision not to reassemble Escalator Three for use as a walker. According to the majority, this decision involved the kind of discretion the discretionary function exception was meant to shield because it "implicated the economic policy of the METRO, i.e., whether it was more cost-effective to reassemble Escalator Three pending repair, or whether to wait until replacement parts arrived." *Ante* at 12. This, to me, is a remarkable result. As any first-year law student knows, the basic approach to negligence law outlined by Judge Learned Hand in *United States v. Carroll Towing Co., 159 F.2d 169 (2d Cir. 1947)*, essentially defines negligence as the unreasonable balancing of the cost of safety measures against the risk of accidents. *See id. at 173* (explaining that "if the probability [of an accident] be called P; the injury, L; and the

burden [of adequate precautions], B; liability depends upon whether B is less than L multiplied by P: i.e., whether B<PL"). Even on the most charitable interpretation of the facts, this is exactly the sort of balancing that was going on when the METRO decided not to reassemble the steps on Escalator Three. The decision that the risks of not reassembling Escalator Three were outweighed by the cost of reassembly involved "the same kind of balancing which citizens do at their peril," *Dalehite v. United States, 346 U.S. 15, 60, 97 L. Ed. 1427, 73 S. Ct. 956 (1953)* (Jackson, J., dissenting), and which courts review every day using ordinary tort law standards, *cf. Blessing, 447 F. Supp. at 1183 n.30* (explaining that the discretionary function exception should apply to the sorts of policy judgments that cannot be reviewed under ordinary tort law standards of due care and reasonableness). If this sort of balancing is immune from judicial review, the discretionary function exception has eclipsed the FTCA's basic goal of making the government liable for tort claims "under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the [tortious] act or omission occurred." *28 U.S.C. § 1346*(b)(1).

The majority's holding in part III B is all the more striking because, consistent with *Gaubert*, the majority pays no attention to the actual processes that led to the decision not to reassemble Escalator Three. The summary judgment record contains no evidence that *anyone* consciously weighed the costs in time and labor of reassembling Escalator Three versus the benefits in increased passenger safety and convenience. The record does not indicate who made the decision. Indeed, the record does not even indicate who had the authority to make the decision. Viewing the evidence in the light most favorable to Smith's family and estate, a reasonable jury could conclude that the decision not to reassemble Escalator Three was made by the escalator repair crew without any significant consultation with supervisory officials and that the repair crew neither sought to balance competing policy considerations nor had the authority to do so. *Cf. Domme, 61 F.3d at 795* (Henry, J., concurring) ("[A] nonmanagerial employee who, away from

the quiet and measured reflection of a budget meeting, decides to compromise safety in order to save government resources may simply be trying to make his or her job easier rather than trying to serve the common good."). If the decision not to reassemble Escalator Three counts as a judgment grounded in the economic policy of the METRO, the discretionary function exception truly has swallowed up the FTCA's waiver of immunity because there are precious few governmental decisions that cannot be seen as an effort to save costs. *See Cope, 45 F.3d at 449* (noting that after government counsel had argued that any decision implicating budgetary concerns should fall within the discretionary function exception, counsel failed during oral argument to provide "even one example of a discretionary decision that would not be exempt for failure to implicate policy concerns" aside from the standard example that the discretionary function exception does not cover the negligent operation of motor vehicles by government employees).[3] Consequently, the upshot of the majority's approach to the discretionary function exception is that the government will nearly always be immune for its actions so long as it has not enacted regulations that completely eliminate the discretion of its employees.

All that said, I cannot say that the majority's analysis in part III B is an unreasonable, or even an incorrect, application of *Gaubert*'s susceptible-to-policy-analysis standard. Although some courts have expressed misgivings about an overly broad interpretation of this standard, no court has held that a judgment based on the desire to cut costs can *never* qualify as "grounded in economic policy" for purposes of the discretionary function exception analysis. Indeed, such a rule would produce its own set of problems because in many instances government decisions based on cost considerations ought to enjoy the protection of the discretionary function exception. *See, e.g., United States v. Varig Airlines, 467 U.S. 797, 820 (1984)* (explaining that decisions requiring an agency "to establish priorities for the accomplishment of its policy objectives by balancing the objectives sought to be obtained against such practical considerations as staffing and funding" are protected by the

discretionary function exception); *Cope, 45 F.3d at 451* (explaining that the government's decisions about whether and when to improve the degree of skid resistance on a section of park road were protected by the discretionary function exception because they involved considerations including "the allocation of funds among significant project demands, the safety of drivers and other park visitors, and the inconvenience of repairs as compared to the risk of safety hazards"). Further, our circuit's case law on the discretionary function exception has signaled our willingness to consider decisions that implicate budgetary concerns as sufficiently policy based to receive immunity. *See Williams v. United States, 50 F.3d 299, 310 (4th Cir. 1995)* ("Contracting out the responsibility to maintain [office space leased by the United States] while balancing fiscal considerations entails exercising judgment based on policy."); *Bowman v. United States, 820 F.2d 1393, 1395 (4th Cir. 1987)* (characterizing a decision based on "a lack of financial resources" as a "policy judgment"). For these reasons, I must conclude that, even in part III B, the majority has correctly applied our circuit's discretionary function exception precedents to the facts of this case. It follows that if this case was about the meaning of the discretionary function exception, I would be bound to concur in the result reached by the majority. Here, however, we are asked to interpret the METRO Compact, and we are not required to follow the *Gaubert* standard wherever it might lead. I suggest that if a correct application of the *Gaubert* standard leads to the result in part III B, this only highlights the shortcomings of that standard and provides a significant reason to consider using a different standard to interpret the METRO Compact.

As the majority's analysis illustrates, the *Gaubert* approach tends to push courts toward holding that judgments involving tradeoffs between cost and safety are grounded in economic policy for purposes of the discretionary function exception. Although such holdings threaten to eviscerate the FTCA, the alternative of claiming that decisions based on budget constraints and the like are never policy based is equally unpalatable. The more reasonable view is that sometimes government decisions requiring tradeoffs between

cost and safety deserve the protection of the discretionary function exception, and sometimes they do not. For example, if an agency makes judgments about the cost-effectiveness of various safety measures and expresses those judgments in the form of a regulation, the discretionary function exception does (and should) protect the regulation (and any conduct it requires) from judicial second-guessing. As Justice Scalia points out, the FTCA's exclusion of liability for all acts of government employees performed with due care "in the execution of a . . . regulation, whether or not such . . . regulation be valid," *28 U.S.C. § 2680*(a), "represents an absolute statutory presumption . . . that all regulations involve policy judgments that must not be interfered with," *Gaubert, 499 U.S. at 336-37* (Scalia, J., concurring in part and concurring in the judgment). But as my discussion of the METRO's decision not to reassemble Escalator Three illustrates, the thoughtless failure of low-level employees to take certain safety precautions ought not to be protected by the discretionary function exception simply because the failure could be rationalized as an effort to save government dollars. These examples suggest that whether the discretionary function exception's protection is warranted depends at least in part on the process by which government decisions are made. *See id. at 335* (Scalia, J., concurring in part and concurring in the judgment in part) (suggesting that "the level at which the decision is made is often *relevant* to the discretionary function inquiry, since the answer to that inquiry turns on *both* the subject matter [of the decision] *and* the office of the decisionmaker"); *see also* Peterson and Van Der Weide, *supra*, at 487-502 (suggesting that "discretionary function immunity ought to be reserved for (1) actual decisions (2) made by government officials possessing authority to direct policy (3) in consideration of legitimate policy factors"); Harold J. Krent, *Preserving Discretion Without Sacrificing Deterrence: Federal Government Liability in Tort, 38 UCLA L. Rev. 871, 915 (1991)* (suggesting that courts should approach the discretionary function exception by "focusing on the decision making process underlying the governmental action challenged"). By eliminating any consideration of the decisionmaker's

authority or the manner in which decisions were actually made, *Gaubert* leaves courts without the analytical tools needed to place sensible limits on the scope of the discretionary function exception. This means that we ought to think long and hard before deciding to follow the D.C. Circuit by exporting the shortcomings of the *Gaubert* standard into our law governing the scope of the METRO's sovereign immunity.

II.

As I explained in part I, the majority's disposition of this case is correct if *Gaubert* provides the proper standard for interpreting section 80 of the METRO Compact. Before proceeding any further, however, it is worth pointing out that the majority's disposition is correct *only* if *Gaubert* is the proper standard; any other approach to reading section 80 would require a different result. If, for example, we read section 80 literally and applied the distinction between governmental and proprietary activities, operating escalators as part of a public transportation system would surely be classified as proprietary and would therefore be unprotected by the METRO's immunity. *See Wainwright v. WMATA, 958 F. Supp. 6, 9 (D.D.C. 1997)* (stating that the METRO's operation of an escalator is a proprietary function); *Warren v. WMATA, 880 F. Supp. 14, 16 (D.D.C. 1995)* (stating that the METRO's "provision of mass transit is generally considered a proprietary function that would not be protected by sovereign immunity"). If we read section 80 as drawing a distinction between planning and operational activities – in other words, if we read section 80 in roughly the same way that many courts read the discretionary function exception prior to *Gaubert* – surely the actions of the METRO in this case fall on the operational side of the line. *Cf. Dant v. District of Columbia, 264 U.S. App. D.C. 284, 829 F.2d 69, 74-75 (D.C. Cir. 1987)* (granting immunity to the METRO on claim that it negligently designed its fare collection system, but denying immunity on claim that the METRO negligently operated and maintained the fare collection system because negligent operation and maintenance are ministerial activities). Likewise, if we read section 80 along the lines suggested by Justice Scalia's concurrence in *Gaubert*, we

would again hold that the METRO was not entitled to summary judgment on its immunity claim because a reasonable jury could conclude that the allegedly negligent decisions in this case were not made by any person who had the authority to make judgments based on social, economic, or political policy. *See Gaubert, 499 U.S. at 335* (Scalia, J., concurring in part and concurring in the judgment). In sum, only the *Gaubert* approach to governmental immunity is expansive enough to justify the result the majority reaches today. This point underscores the importance of asking whether there are good reasons for following the D.C. Circuit's decision to use *Gaubert* to analyze the governmental function exception in section 80 of the METRO Compact. I submit that the D.C. Circuit's approach to the governmental function exception is inconsistent with the intent of the Compact's framers and that any pragmatic considerations supporting that circuit's approach are not strong enough to justify it.

The D.C. Circuit first held in *Sanders v. WMATA, 819 F.2d 1151 (D.C. Cir. 1987)*, that the governmental function exception in the METRO Compact should be analogized to the discretionary function exception in the FTCA. In *Sanders* the court began its analysis by observing that the meaning of the governmental/proprietary distinction in section 80 is a question of federal law. *See 819 F.2d at 1154.* The court then explained that because Congress had played an active role in the creation and approval of the METRO Compact, the decision to grant immunity for torts committed by METRO employees in the performance of governmental functions should be understood as a decision to adopt Congress's understanding of "governmental function." That understanding, the court reasoned, was embodied in the Supreme Court's decision in *Dalehite v. United States, 346 U.S. 15, 97 L. Ed. 1427, 73 S. Ct. 956 (1953)*, where the Supreme Court construed the discretionary function exception to the FTCA as an effort to free the government from "liability arising from acts of a governmental nature or function." *Id. at 28.* Accordingly, the *Sanders* court concluded that the framers of the METRO Compact (Maryland, Virginia, and the District of Columbia) had

"accepted the *Dalehite* conception" when they chose to grant the METRO immunity from tort liability for its performance of governmental functions. *Sanders, 819 F.2d at 1155.* The D.C. Circuit later extended this reasoning in *Burkhart*, holding that the Supreme Court's analysis of the discretionary function exception in *Gaubert* should also apply to the interpretation of "governmental function" in section 80 of the METRO Compact. *Burkhart, 112 F.3d at 1216.* The majority adopts the D.C. Circuit's analysis in *Sanders* and *Burkhart* in parts II B and C of its opinion.

With all respect to the majority and our sister circuit, I do not believe that the framers of the METRO Compact intended the governmental/proprietary distinction in section 80 to track the distinction between discretionary and ministerial acts in § 2680(a) of the FTCA. To begin with the most obvious point, surely the Compact's framers would have used the terms "discretionary" and "ministerial" in section 80 if they had meant to signal their allegiance to *Dalehite*. Instead, the framers used the traditional language of municipal immunity. *See* 18 Eugene McQuillin, *The Law of Municipal Corporations* § 53.02.05 (3d ed. 1993) (explaining that the distinction between governmental and proprietary functions is the oldest approach to the law of municipal immunity). The Supreme Court's decision in *Indian Towing Co. v. United States, 350 U.S. 61, 100 L. Ed. 48, 76 S. Ct. 122 (1955)*, casts further doubt on the claim that the Compact's framers intended to adopt the understanding of governmental functions expressed in *Dalehite*. In *Indian Towing* the Supreme Court explicitly rejected the governmental/proprietary distinction as a proper framework for interpreting the FTCA. The Court characterized the law of municipal liability as a "quagmire" and the rule of law distinguishing "governmental" from "non-governmental" (or proprietary) functions as "inherently unsound." *Id. at 65.* It explained that the FTCA is a repudiation of the "casuistries of municipal liability for torts." *Id.* If the framers of the Compact can be presumed to have been aware of *Dalehite*, they must also be presumed to have been aware of *Indian Towing*. In light of *Indian Towing*'s insistence that the FTCA does not carry forward the doctrines of municipal liability, it is hard to

believe that the framers of the Compact would have employed the governmental/proprietary distinction in section 80 in order to adopt the reading of the FTCA set forth in *Dalehite*. It makes far more sense to believe that section 80 was drafted as a compromise between the differing rules of governmental immunity then followed by the Compact's signatories. *Cf. Martin v. WMATA, 667 F.2d 435, 436 (4th Cir. 1981).*

Moreover, even if it was reasonable to believe that the framers of the METRO Compact meant to accept the *Dalehite* conception of governmental tort immunity, it would not follow that they meant for the governmental function exception in the METRO Compact to expand or contract with the Supreme Court's rulings on the scope of the discretionary function exception. *Dalehite* was widely understood to employ a distinction between planning and operational activities, *see* Krent, *supra*, at 880, a distinction the *Sanders* court seemed to assume when it held that the framers of the METRO Compact had accepted the *Dalehite* conception. *See Sanders, 819 F.2d at 1156* (distinguishing between "general attacks on the testing plan itself" and attacks on the "manner of testing in a particular case" in holding that the METRO was immune from tort liability for the adoption of policy requiring drug and alcohol testing immediately after on-the-job accidents or unusual operating incidents). No one would have imagined in 1966 that the discretionary function would come to be read so broadly as the Supreme Court read it in *Gaubert*, and there is no reason to believe that the framers of the Compact would have intended that the governmental function exception in section 80 be given such a broad reading. Finally, the fact that the meaning of the governmental function exception is a matter of federal law does not indicate that the meaning of "governmental function" in the Compact should track the meaning of "discretionary function" in the FTCA. The meaning of each term may present a question of federal law, but it does not follow that each presents the same question of federal law. Consequently, I am unpersuaded by the D.C. Circuit's arguments that its approach to the METRO Compact is consistent with the intent of the Compact's framers.

Perhaps, though, the D.C. Circuit's decision to use the *Gaubert* standard in interpreting the METRO Compact's governmental function exception rests more on pragmatic considerations than on any judgment about the intent of the Compact's framers. Our sister circuit may believe that we should adopt the body of law governing the discretionary function exception when interpreting the METRO Compact simply because, when contrasted with the traditional distinctions between governmental and proprietary functions or between planning and operational level activities, *Gaubert*'s susceptible-to-policy-analysis test at least provides a workable standard that can be consistently applied. In other words, the D.C. Circuit's argument may simply be that the *Gaubert* standard ought to be adopted because, for all its flaws, it is really the only game in town. Although I agree that the traditional distinction between governmental and proprietary functions is untenable and that we need a workable standard for determining the scope of the METRO's immunity, this argument both overstates the workability of the *Gaubert* standard and understates the viability of possible alternatives to that standard. First, I have already noted that courts have had considerable difficulty in deciding whether government actions are grounded in economic, social, or political policy. *See infra* at 20. This has led to significant inconsistency in the case law. *Compare, e.g., Tippett v. United States, 108 F.3d 1194, 1197-99 (10th Cir. 1997)* (holding that government's failure to warn about the dangers of a charging moose was grounded in policy and was therefore protected by the discretionary function exception), *with George v. United States, 735 F. Supp. 1524, 1533-34 (M.D. Ala. 1990)* (stating that government's failure to warn about the presence of large alligators in a designated swimming area was not grounded in policy and was therefore outside the scope of the discretionary function exception). Indeed, I suggested above that by preventing courts from considering the decisionmaker's authority to make policy judgments, *Gaubert* deprives courts of the analytical tools they need to draw sensible distinctions in the area of governmental immunity. Second, any increase in the predictability and consistency of judicial decisions that might

have come about in the wake of *Gaubert* has come at the significant cost of allowing the discretionary function exception to swallow up the FTCA's general waiver of sovereign immunity. Finally, there is at least one approach that would provide a viable alternative to the *Gaubert* standard. This is the approach suggested by Justice Scalia in his *Gaubert* concurrence. According to Justice Scalia, "a choice is shielded from liability by the discretionary function exception if the choice is, under the particular circumstances, one that ought to be informed by considerations of social, economic, or political policy and is made by an officer whose official responsibilities include assessment of those considerations." *Gaubert, 499 U.S. at 335* (Scalia, J., concurring in part and concurring in the judgment). This standard is at least as easy to apply as the susceptible-to-policy-analysis standard adopted by the *Gaubert* majority, and it would provide a more reasonable approach to interpreting the governmental function exception in section 80 of the METRO Compact. Further, even if it could be said that the framers of the METRO Compact "accepted the *Dalehite* conception" of governmental functions, *Sanders, 819 F.2d at 1155*, this acceptance would be better reflected in Justice Scalia's approach than in that of the *Gaubert* majority because Justice Scalia sought to preserve the insights of the planning/operational distinction suggested by *Dalehite*. *See Gaubert, 499 U.S. at 335* (Scalia, J., concurring in part and concurring in the judgment) (explaining that his approach "recognizes that there is something to the planning vs. operational dichotomy").[4] These reasons suggest that there is at least one viable alternative to the *Gaubert* standard and that the "only game in town" argument for adopting that standard is unconvincing.

I conclude, then, that the D.C. Circuit erred in deciding that *Gaubert* provides the proper standard for defining the governmental function exception in section 80 of the METRO Compact. Yet because our sister circuit's approach to section 80 appears well-established, the cost of refusing to follow that approach is to create a circuit split between the only two circuits that are likely to hear tort claims against the METRO. As the majority points out, we have recognized that

maintaining consistency between our circuit and the D.C. Circuit is an important consideration when interpreting the METRO Compact. *Ante* at 8 n.9 (citing *Lizzi v. Alexander, 255 F.3d 128, 134 (4th Cir. 2001)).* This raises the difficult question of whether adopting what I regard as a better reading of the METRO Compact is worth the price of creating a circuit split. While I appreciate the practical considerations behind the majority's decision to follow the D.C. Circuit's reading of section 80, the price of intercircuit consistency on this issue is the gutting of the Compact's waiver of sovereign immunity. I believe that price is too high. I would therefore hold that Justice Scalia's *Gaubert* concurrence provides a better standard for deciding whether tortious conduct that does not involve quintessentially governmental activities is shielded by the METRO's immunity. Consequently, I must respectfully dissent from Parts II B and C of the majority opinion. This conclusion leaves the question of whether, under the standard proposed by Justice Scalia, the district court erred in refusing to recognize the METRO's immunity for (1) the decision to use Escalator One as a stationary walker, (2) the decision not to reassemble Escalator Three, and (3) the failure to warn its passengers that there was no ascending escalator in operation at the Bethesda station.

III.

To reiterate, Justice Scalia's standard regards a discretionary choice as policy based, and therefore immune, only "if the choice is, under the particular circumstances, one that ought to be informed by considerations of social, economic, or political policy and is made by an officer whose official responsibilities include assessment of those considerations." *Gaubert, 499 U.S. at 335* (Scalia, J., concurring in part and concurring in the judgment). As my earlier discussion of the METRO's decision not to reassemble Escalator Three indicates, the summary judgment record here would allow a reasonable jury to conclude that the person or persons who made the decision not to reassemble Escalator Three did not have the authority to make policy judgments about whether the increased repair costs of reassembling the escalator outweighed the increased risk to passengers created by leaving the escalator disassembled.

Accordingly, I would affirm the district court's refusal to grant the METRO immunity for its decision not to reassemble Escalator Three. I must therefore dissent from part III B of the majority's opinion. Because the record is likewise unclear about who made the decision to brake Escalator One and the decision not to warn passengers about the unavailability of an ascending escalator at the Bethesda station, I would also conclude that the METRO has not proven that it is entitled to immunity for these decisions. I am unclear, however, on whether these two theories of negligence survived the district court's summary judgment ruling. The district court clearly ruled that Smith's family and estate had forecast sufficient evidence for a jury to conclude that the METRO had breached its duty of care to Smith by failing to provide a safe means of exiting the Bethesda METRO station and that this breach was the proximate cause of Smith's death. In so ruling, the district court seemed to focus mainly on the METRO's alleged failure to properly maintain and repair the escalators at the Bethesda station, but the court did not break down the theories of negligence advanced by Smith's family and estate as explicitly as the majority does today. As a result, I am not sure the district court has decided whether the METRO's decision to use Escalator One as a stationary walker (given the unavailability of any other functioning escalator) and its failure to warn passengers about the unavailability of an escalator at the Bethesda station raise jury questions on the issues of negligence and proximate cause. I would therefore remand for clarification on these points, much as the majority does in Part III E of its opinion.

IV.

In sum, I acknowledge that if *Gaubert* is the proper standard for applying the METRO Compact's governmental function exception, the majority has correctly disposed of this case. This point underscores the need for close attention to the question of whether we should follow the D.C. Circuit's reading of the Compact. Because I believe that *Gaubert*'s susceptible-to-policy-analysis standard protects a far greater range of conduct than the Compact's framers would have envisioned, I dissent from the majority's decision to adopt the *Gaubert* standard. Instead, I would adopt the standard

proposed by Justice Scalia in his *Gaubert* concurrence because it is more consistent with the intent of the framers of the METRO Compact and does a far better job than the *Gaubert* standard of identifying those government decisions that are sufficiently policy based to warrant the protection of the governmental function exception. Applying that standard, I would allow the case to proceed to trial on the question of whether the METRO's decision not to reassemble Escalator Three was negligence and was the proximate cause of Smith's death. I would instruct the district court to clarify on remand whether the other theories of negligence advanced by Smith's family and estate survived the summary judgment ruling.

Footnotes

n1 The *Gaubert* majority did not explicitly address this point, but Justice Scalia's concurrence clearly states that the discretionary function exception should apply only when "the decisionmaker [is] an official who possesses the relevant policy responsibility." *Gaubert, 499 U.S. at 336* (Scalia, J., concurring in part and concurring in the judgment). The *Gaubert* majority's silence in the face of Justice Scalia's insistence that the actual decisionmaker be authorized to make policy judgments is naturally read to signal indifference to that requirement. The majority's opinion in this case appears to agree with my reading of *Gaubert*, for it fails to address the questions of who made the decisions challenged by Smith's family and estate and whether those persons had the authority to make policy judgments.

n2 There are exceptions, of course. The First Circuit has identified a line of cases suggesting that the discretionary function exception covers judgments that balance "incommensurable values in order to establish [policy] priorities" but does not protect "judgments that embody a professional assessment undertaken pursuant to a policy of settled priorities." *Shansky, 164 F.3d at 694. See also Cope v. Scott, 310 U.S. App. D.C. 144, 45 F.3d 445, 451-52 (D.C. Cir. 1995)* (holding that the discretionary function exception did not protect the government's allegedly negligent failure to post proper warnings at certain points along a park road because the government had already chosen to place

numerous road signs along the same stretch of road and "the discretion regarding where and what type of signs to post is not the kind of discretion protected by the discretionary function exception").

n3 Like the government's counsel in *Cope*, the majority acknowledges that negligent operation of motor vehicles does not fall within the discretionary function exception. *See ante* at 9 n.11. Thus, the majority would presumably conclude that the METRO would not be immune from liability if one of its bus drivers caused an accident by driving at an unsafe rate of speed. But it is not obvious why a bus driver's decision to drive at an excessive rate of speed in an effort to be on time at the next bus stop is distinguishable from the METRO's decision that reassembling Escalator Three would be too costly. Each decision can be said with equal plausibility to implicate the METRO's policy objectives.

n4 Some commentators have suggested that the best approach to government immunity would go farther than Justice Scalia's *Gaubert* concurrence by requiring not only that decisionmakers have the authority to make policy judgments, but also that the decisionmakers actually consider policy variables in making those judgments. *See* Peterson and Van Der Weide, *supra*, at 487-90. This proposal has considerable appeal, but I would not decide its merits today because Justice Scalia's approach adequately addresses the facts of this case.

Civil Action No. AW-99-2187

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND, SOUTHERN DIVISION

RICHARD LEE SMITH, et al.,
Plaintiffs,

vs.

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY,
Defendant.

February 7, 2001, Decided

COUNSEL:
For NANCY G. SMITH, plaintiff: Lawrence S. Lapidus, Karp, Frosh, Lapidus, Wigodsky & Norwind, P.A., Washington, DC.

For NANCY G. SMITH, plaintiff: Ronald A. Karp, Karp Frosh Lapidus Wigodsky & Norwind, Rockville, MD.

For WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY, defendant: Robert J. Kniaz, Deputy General Counsel, WMATA, David R. Keyser, WMATA, Detria J. Liles, Washington Metro Transit Authority, Washington, DC USA.

JUDGES:
Alexander Williams, Jr., United States District Judge.

OPINION BY:
Alexander Williams, Jr.

OPINION:

MEMORANDUM OPINION

Plaintiffs, Richard and Nancy Smith, bring this wrongful death and survival action based upon the fatal heart attack their son suffered while he was climbing an escalator

temporarily used as a stairway at a metro station operated by Defendant, the Washington Metropolitan Area Transit Authority ("WMATA"). Plaintiffs claim two million dollars in damages for the Defendant's alleged negligence in having only no ascending escalator available on the day of their son's death. Currently pending before the Court is Defendant's Motion for Summary Judgment [24-1]. The motion has been fully briefed by all parties. On January 30, 2001, the Court held a hearing on the pending motion. Upon consideration of the arguments made in support of, and opposition to, the Defendant's motion, the Court makes the following determinations.

I. FACTUAL BACKGROUND

On July 20, 1998, Plaintiffs' son, Richard Smith, was a metro passenger at the Defendant's Bethesda Metro Station. On that summer day, temperatures rose to over ninety degrees. At the time Mr. Smith attempted to exit the station, two of three station escalators were not in service. On July 8, 1998, the Maryland inspector took one escalator ("escalator number 2") out of service for various safety violations as unfit for public use. On the morning of July 20, 1998, WMATA took the other escalator out of service for repairs ("escalator number 3"). As a result, only one escalator was available for ingress and egress during the rush hour period ("escalator number 1"). With only one properly functioning escalator, Defendant shut down that escalator for use as a stairway for passengers known as a "walker." Described as one of the tallest in the country, the escalator was very steep with a vertical height of approximately 107 feet. One elevator with limited capacity was also available to exiting passengers.

At around 3:00 p.m., Mr. Smith arrived at the Bethesda Metro Station. The station manager claims that he observed Mr. Smith by the crowd awaiting to board the elevator. He, then, observed Mr. Smith going through the line to the escalator. Mr. Smith attempted to exit by climbing the stationary escalator. The station manager stated that, besides Mr. Smith, he observed a few other people attempting to climb the stairs. The station manager noted that, given Mr.

Smith's size at 6'1" and 220 pounds, people noticed his attempt to climb the stairs. The station manager testified that other passengers commented that "he kind of heavy to be doing that. I wouldn't do it" At the top of the stairs, Mr. Smith collapsed and suffered a fatal heart attack. Mr. Smith's autopsy revealed that, at age 37, he suffered from arteriosclerosis, a severe hardening of the arteries. Mr. Smith's heart disease made him susceptible to a heart attack upon a certain level of overexertion. Apparently, Mr. Smith knew his cholesterol level was high, but was unaware of his heart disease.

II. DISCUSSION

A. Legal Standard

Rule 56 of the Federal Rules of Civil Procedure provides that summary judgment will be granted when no genuine dispute of material fact exists and the moving party is entitled to judgment as a matter of law. *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986); Haavistola v. Community Fire Co. of Rising Sun, Inc., 6 F.3d 211, 214 (4th Cir. 1993); Etefia v. East Baltimore Comm. Corp., 2 F. Supp. 2d 751, 756 (D. Md. 1998).* For the purposes of summary judgment, a genuine dispute exists if a reasonable jury could return a verdict for the nonmoving party. *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986).* Rule 56 of the Federal Rules of Civil Procedure provides that the entry of summary judgment is proper, "after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Cray Communications, Inc. v. Novatel Computer Systems, Inc., 33 F.3d 390, 393 (4th Cir. 1994).*

In reviewing a motion for summary judgment, the court must "draw all justifiable inferences in favor of the nonmoving party, including questions of credibility and of the weight to be accorded to particular evidence." *Masson v. New Yorker Magazine, 501 U.S. 496, 520, 111 S. Ct. 2419, 115 L.*

Ed. 2d 447 (1991) (citations omitted). While the evidence of the non-movant is to be believed and all justifiable inferences drawn in his or her favor, a party cannot create a genuine dispute of material fact through mere speculation or compilation of inferences. See *Deans v. CSX Transportation, Inc., 152 F.3d 326, 330-31 (4th Cir. 1998).* The party opposing summary judgment must present evidence of specific facts from which the finder of fact could reasonably find for him or her. *Anderson, 477 U.S. at 252.* Nevertheless, the moving party ultimately bears the burden of demonstrating the absence of all genuine issues of material fact. See *Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587-88, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986).*

B. Negligence

Plaintiffs appear to assert a number of theories of negligence. As a case brought before the federal court under its diversity jurisdiction, the substantive laws of the forum state, Maryland, apply. See, e.g., *Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78, 82 L. Ed. 1188, 58 S. Ct. 817 (1938).* Maryland recognizes the traditional elements for establishing a claim for negligence: (1) the existence of a duty owed to the plaintiff by the defendant; (2) the defendant's breach of that duty, (3) the breach was the proximate cause of the harm suffered by the plaintiff; and (4) actual damages suffered by the plaintiff. See *Jacques v. First Nat'l Bank, 307 Md. 527, 531, 515 A.2d 756 (1986).* "[A] party who has the burden of proving another party guilty of negligence cannot sustain this burden by offer a mere scintilla of evidence, amounting to no more that surmise, possibility, or conjecture . . . ." *Fowler v. Smith, 240 Md. 240, 247, 213 A.2d 549 (1965).*

Thus, the first question is whether WMATA owed a duty to the Plaintiffs' son as a metro passenger. In Jacques v. First Nat'l Bank, the Maryland Court of Appeals stated that "in determining whether a tort duty should be recognized in a particular context, two major considerations are: the nature of the harm likely to result from a failure to exercise due care, and the relationship that exists between the parties." *307 Md. at 534-35.* In *Village of Cross Keys, Inc. v. U.S.*

Gypsum Co., 315 Md. 741, 752, 556 A.2d 1126, 1131 (1989) (quoting *Tarasoff v. Regents of University of California, 17 Cal. 3d 425, 131 Cal. Rptr. 14, 551 P.2d 334, 342 (1976))*, the court added that

> among the variables to be considered in determining whether a tort duty should be recognized are: The foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered the injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, the policy of preventing future harm, the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability, cost and prevalence of insurance for the risk involved.

"[A] duty is readily found if it appears highly likely that the conduct in question should have brought about **[**8]** the harm." *B.N. v. K.K., 312 Md. 135, 142, 538 A.2d 1175 (1988)*. A duty will be imposed if "the actual harm fell within a general field of danger which should have been anticipated." *Segerman v. Jones, 256 Md. 109, 132, 259 A.2d 794 (1969)* (quoting *McLeod v. Grant County Sch. Dist., 42 Wn.2d 316, 255 P.2d 360, 363 (Wash. 1953))*. However, where the occurrence of the injury is highly extraordinary, the law will not impose liability. *312 Md. at 141*. Before imposing a duty to prevent a particular consequence, the court must also consider the burdens to both the defendant and the community of imposing the duty against the social benefits flowing from charging the defendant with the duty. See *Valentine v. On Target, Inc., 112 Md. App. 679, 686 A.2d 636 (1996)*.

It is well recognized that a common carrier owes a duty to its passengers to provide a safe means of ingress and egress from its station premises. *Washington Metropolitan Area Transit Authority v. Reading, 109 Md. App. 89, 674 A.2d 44*

(1996); Kaplan v. Baltimore & O. R. Co., 207 Md. 56, 113 A.2d 415 (1955); Ortiz v. Greyhound Corp., 275 F.2d 770 (4th Cir.1960). "[A] common carrier, such as WMATA, is obligated to use the highest degree of care that is consistent with its mode of transport to ensure the safety of its passengers." *Reading, 109 Md. App. at 100, 674 A.2d at 49.* "When a carrier has reason to anticipate the gathering of a large crowd at a station, it is bound to take such reasonable precautions as the condition to be anticipated may dictate to avert injury to a passenger by the rushing or crowding of the persons thus assembled." *Dilley v. Baltimore Transit Co., 183 Md. 557, 562, 39 A.2d 469, 471 (1944).* Here, it is undisputed that, by design, the escalators were the primary means for metro passengers to exit the station, "so that no alternative easily accessible steps were provided." (Def. Mot. Summ. J. at 24) The Bethesda Metro Station was regularly subject to heavy foot traffic during the evening rush hour. Therefore, WMATA had reason to anticipate a large crowd at the time in which no escalator was operating. WMATA owed a duty to its passengers to take reasonable measures to facilitate the exiting of passengers by keeping the primary avenue for egress (the escalators) in good repair and functioning or providing an alternative outlet that could reasonably accommodate the crowd of exiting passengers.

In the instant case, on a hot day with temperatures exceeding ninety degrees during the evening rush hour, Defendant provided its passengers two means to exit the station, the escalator used as a ten-story stairway and an elevator with limited capacity. The "walker" escalator was used for both entering and exiting traffic. The elevator could only carry nine passengers every 2.5 minutes or an average of 216 persons per hour. Defendant acknowledges the use of the elevator as the primary means of ingress and egress as creating "a potentially hazardous situation as patrons squeeze forward to use an elevator not designed for continuing use by large crowds . . . ." (Def. Mot. Summ. J.at 24.). It is undisputed that, at the time Plaintiffs' son attempted to exit from the Bethesda station, the station was servicing a large number of passengers. William Ford, the station manager, described the conditions as "hectic" and "crowded." Plaintiffs' expert, Jake

Pauls estimates that an average of 628 people per hour attempted to exit the Bethesda Metro Station during the evening rush hour. (Pl.'s Opp'n Mot. Summ. J., Ex. A at 11).

Defendant contends that, due to circumstances beyond its control, it could not avoid shutting down all of the escalators. Defendant argues that escalator 2 could not have been returned to active service for any purpose until the state escalator inspector approved its return. Plaintiffs counter that, if Defendant had performed adequate inspections and repairs, there would have been no need for the escalator to be taken out of service in the first place. According to WMATA, the state inspector made an abrupt change in position and ordered that the escalator be barricaded. WMATA maintains that it was customary for the state inspector to allow escalators taken out of service for safety violations to be used as "walkers" until certification. WMATA urges that it could not have anticipated that the state inspector would not allow the escalator to be used as a "walker." However, the Maryland Code specifically gives the state inspector the authority to prevent the continued operation of escalators that are safety hazards. See Md. Code Ann. 1957, Art. 89, s 49B(h); Labor and Employment, § 5-210 (1998). WMATA acknowledges that the Chief Elevator-Escalator Inspector of Maryland had definitively stated that it was a violation to use metro station escalators as "walkers."[1] Regardless of WMATA's beliefs as to the merits and legal effect of that opinion, WMATA can hardly claim that they were "surprised" by the state inspector's enforcement of the Chief Elevator-Escalator Inspector's position on the use of escalators as "walkers." Defendant's own expert, Robert L. Seymour, stated "I personally have a problem with escalators as walkers because of the difference of risers, the sharpness of the steps, the construction of the steps." (Seymour Dep. at 30.)

Plaintiffs also note that, even if escalator 2 could not have been used as a descending stairway, Defendant breached its duty of care in removing escalator 3 from service. According to Plaintiffs, if escalator 3 was used as a descending stairway, escalator 1 could have been properly used as an ascending means to exit without the exertion of climbing 160 oversized

steps. Defendant counters that the nature of repairs on escalator 3 made returning it to service impracticable and potentially unsafe. Plaintiffs also posit that Defendant could have employed a device used to assist the handicapped when the elevator at a station is out of service in order to alleviate the crowded conditions at the metro station. Under this protocol, an audio announcement on the trains alerts passengers that elevator service is not available beforehand and that shuttle bus service from a nearby station is available.

Under these circumstances, the Court finds that a reasonable jury could conclude that Defendant had a duty to provide a reasonable passage for exiting the station that would reasonably accommodate the growing crowd of passengers. Given the extreme weather conditions that day and the uniquely steep construction of the escalator, one cannot say that, as a matter of law, Defendant took appropriate measures consistent with its duty of care owed to its passengers. "It is for the jury to determine whether the defendant was guilty of negligence by considering the care and precautions which should have been taken by it." *Dilley, 183 Md. at 563, 39 A.2d at 472.* Plaintiffs have produced sufficient evidence to raise a genuine dispute as to whether Defendant breached a duty of care owed to Mr. Smith by failing to take appropriate precautionary measures to guard the safety of passengers attempting to exit the station.

a. Proximate Cause

As part of their burden, Plaintiffs must also establish that WMATA's alleged breach of its duty of care proximately caused their son's injury. In *BG&E v. Lane, 338 Md. 34, 51, 656 A.2d 307 (1995)*, the Maryland Court of Appeals held that the proximate cause element is "satisfied if the negligence is 1) a cause in fact of the injury and 2) a legally cognizable cause." There is no dispute that the exertion of climbing the steep stationary escalator was a cause-in-fact of Mr. Smith's ensuing heart attack. The close temporal nexus between Mr. Smith's climb and his collapse from the heart attack evidence that issue. Thus, the primary issue centers on whether the absence of an ascending escalator constitutes a legally cognizable cause of Mr. Smith's death.

In assessing whether conduct amounts to a legally cognizable cause of the plaintiff's injury, Maryland case law instructs the Court to consider notions of fairness and social policy and "principles of common sense in light of surrounding facts and circumstances." *Taylor v. Feissner, 103 Md. App. 356, 366, 653 A.2d 947 (1995);* see *Lane, 338 Md. at 51.* However, the determination as to whether the injury was foreseeable is a question of fact confined to the discretion of the trier of fact. See *Lane, 338 Md. at 51.* "'Negligence is the proximate cause of an injury when the injury is the natural and probable result or consequence of the negligent act or omission.'" *Bell v. Heitkamp, Inc., 126 Md. App. 211, 222, 728 A.2d 743, 748 (1999)* (quoting *Medina v. Meilhammer, 62 Md. App. 239, 247, 489 A.2d 35 (1985)).* Even assuming that WMATA had a duty to have at least one ascending escalator functioning at the metro stop, the Plaintiffs must show that their son's heart attack was a natural and probable consequence of WMATA's failure to provide an ascending escalator.

One Maryland court has addressed the issue of whether a defendant may be liable in tort when its conduct precipitates the death of the plaintiff by aggravating a pre-existing cardiovascular condition. In *Industrial Service Co. v. State, 176 Md. 625, 629, 6 A.2d 372, 374 (1939),* a lender's agent harassed and physically assaulted the decedent as part of his collection tactics. Several days after the incident, the decedent died of a heart attack. *Id. at 631.* The medical testimony revealed that the victim's pre-existing coronary ailment was aggravated by the agent's attack leading to her heart attack. *Id. at 632-33.* The Maryland Court of Appeals held that a reasonable jury could find a causal connection between the decedent's death and the agent's conduct based upon the medical testimony and the close temporal proximity between the physical assault and the fatal heart attack. *Id. at 637-38.*

Courts in other jurisdictions have similarly found that a sufficiently triable issue exists when a defendant's conduct accelerates the occurrence of a heart attack by aggravating the pre-existing heart condition of the plaintiff. See *Sumpter v. City of Moulton, 519 N.W.2d 427, 434-35 (Iowa App.*

1994); Bailey v. Missouri Pac. R. Co., 383 So. 2d 397, 402 (La. Ct. App. 1980). In Sumpter v. City of Moulton, the Iowa court found that a city's failure to clean ditches could reasonably have been the proximate cause of a heart attack suffered by a property owner attempting to clean the public ditches adjacent to his property. *519 N.W.2d at 435.* The court noted that "the heart attack may have been inevitable, but the omission by the city may have aggravated [the plaintiff's] condition and hastened the process." *519 N.W.2d at 433.* Consequently, the court could not "conclude as a matter of law that some injury was not reasonably foreseeable from the failure to maintain the ditches." Id.

In Bailey v. Missouri Pac. R. Co., the defendant ordered the plaintiff to perform strenuous labor in the summer heat. *383 So. 2d at 399.* Working under the onerous conditions, the plaintiff collapsed from a heat stroke and subsequently suffered a heart attack. Id. The defendant argued that the plaintiff's heart attack was unforeseeable because the plaintiff's arteriosclerotic condition was unknown at the time of the incident. *Id. at 402.* The court responded that, in order for a defendant to be liable for consequential damages, he need not necessarily foresee the particular consequences of his negligent acts. Id. The court found that the foreseeable risk of harm in this case was exposure to heat stroke or a collapse. Id. As the heart attack was a consequence of the increased strain on the plaintiff's heart aggravated by the heat stroke and the plaintiff's pre-existing condition, the court affirmed the finding of negligence. Id.

In the present action, the Defendant offered a ten-story stairway as an exit from the station on a summer day when temperatures exceeded ninety degrees. It is undisputed that the 107-foot stairway offered no landing for resting. As discussed earlier, the only other alternative exit, the elevator, was drastically ill-equipped to handle the large number of passengers frequenting the station at the time of Mr. Smith's collapse. The elevator had a maximum capacity of 216 persons per hour at the time when possibly 628 people were attempting to exit the station. A jury could reasonably believe that the crowded and hectic conditions at the station made selecting the elevator an arduous, and potentially dangerous,

undertaking. Under these circumstances and drawing all reasonable inferences in favor of Plaintiffs, a reasonable jury could conclude that it was foreseeable that passengers would take Defendant's invitation to exit the station by climbing the stairs. According to Dr. Mitchell Krucoff, Plaintiff's medical expert, the combination of the high temperature and the extraordinary exertion of climbing the metro station escalator created sufficient stress on Mr. Smith to aggravate his heart disease and hasten the occurrence of the fatal heart attack. However, Dr. Krucoff states that ordinary walking or climbing a small number of stairs would not have been sufficient to cause Mr. Smith's death. Given the totality of the circumstances surrounding Mr. Smith's death, one cannot say that, as a matter of law, a passenger's collapse and subsequent heart attack could not be a natural and probable consequence of the exertion of climbing one of the tallest escalators in the nation in ninety degree weather. Accordingly, the Plaintiffs have made a sufficient showing of proximate cause for purposes of summary judgment. The proof of damages is not in dispute and is apparent. Accordingly, the Courts concludes that Plaintiffs produced sufficient evidence to survive summary judgment.

C. Use of a Statute as Evidence of Negligence.

As further evidence of WMATA's negligence, Plaintiffs refer to purported violations of the A17.1 code as published by the American National Safety Institute ("ANSI") and the American Society of Mechanical Engineers ("AMSE"). The A17.1 handbook states that "the use of a stationary escalator as a stairway is a violation of building codes." (Seymour Dep. at 24 (quoting Edward A. Donoghue, American Society of Mechanical Engineers, The A17.1 Handbook 319 (1996)). Plaintiffs' expert, Mr. Pauls, interprets this provision to state that the use of escalators as "walkers" is contrary to national safety standards and in violation of the A17.1 code. Mr. Paul's interpretation is consistent with the opinion of the Chief Elevator-Escalator Inspector as expressed in field directive 98.2. Field Directive 98.2 states that "by virtue of [the definition of stair], it has always been this division's view that if an escalator is not running it should not be used as stairs allowing individuals to access and egress the various

structural levels." (Seymour Dep. at 25) (quoting Division of Labor and Industry, Field Directive 98.2. (Sept. 28, 1998)). In response, Defendant's expert emphasizes that the handbook is not the A.17 code and, thus, is not an enforceable document. Defendant also maintains that the opinion of the Chief Elevator-Escalator Inspector is without force of law.

In Maryland, the violation of a statute may serve as evidence of negligence, but does not constitute negligence per se. *Hartford Ins. Co. v. Manor Inn, 335 Md. 135, 155, 642 A.2d 219 (1994); Pahanish v. Western Trails, Inc., 69 Md. App. 342, 362, 517 A.2d 1122 (1986).* "It is the rule in [Maryland] that the mere violation of a statute or ordinary negligence will not support an action for damages, even though it may be evidence of negligence, unless there is legally sufficient evidence to show that the violation was the proximate cause of the injury." *Austin v. Buettner, 211 Md. 61, 70, 124 A.2d 793 (1956).* Where the plaintiff relies on the violation of a statute as proof of negligence, "proximate cause is established by determining whether the plaintiff is within the class of persons sought to be protected, and the harm suffered is of a kind which the drafters intended the statute to prevent." *Brown v. Dermer, 357 Md. 344, 359, 744 A.2d 47 (2000);* see also *Erie Inc. Co. v. Chops, 322 Md. 79, 84, 585 A.2d 232 (1991); Atlantic Mut. Ins. Co. v. Kenney, 323 Md. 116, 124, 591 A.2d 507 (1991).*

The ANSI A17.1 code is the model escalator and elevator safety code. The Maryland Code provides that "all new and existing elevators, dumbwaiters, escalators, and moving walks shall be inspected, tested and maintained in a safe operating condition in accordance with the American National Standard Safety Code for elevators, dumbwaiters, escalators, and moving walks, known as ANSI A17.1-1971, and all subsequent amendments and revisions to it, as adopted by the Commissioner, and any rules and regulations as may be adopted by the Commissioner." Md. Code Ann. 1957, Art. 89, § 49B (1998). The implementing regulations on escalator safety state: "The ASME A17.1-1996 Safety Code for Elevators and Escalators, . . . , is incorporated by reference and is effective April 6, 1998." Md. Regis. Code tit. 09, § 12.81.01(I) (2000).

Defendant's expert correctly states that the handbook is not the code. The A.17 Handbook appears to be an interpretive publication by a recognized expert in the field. However, courts "often look to the legislative history, an agency's interpretation of the statute, and other sources for a more complete understanding of what the General Assembly intended when it enacted particular legislation." *Adamson v. Correctional Medical Services, Inc., 359 Md. 238, 251-52, 753 A.2d 501, 508 (2000).* See also *Jefferson v. Jones, 286 Md. 544, 548, 408 A.2d 1036, 1039 (1979)* ("While [the U.C.C. comments] are not controlling authority and may not be used to vary the plain language of the statute, they are an excellent place to begin a search for the legislature's intent when it adopted the Code."); *State v. Tibor, 373 N.W.2d 877, 882 n. 6 (N.D.1985)* ("When a statute is derived from the Model Penal Code we may look to the comments from the relevant sections for insight into the meaning and application of the statute."); *Rescigno v. Picinich, 151 N.J. Super. 587, 377 A.2d 733, 738 (N.J. 1977)* ("The treatise of the draftsman of legislation is an extrinsic interpretative aid of considerable weight."). It is undisputed that Mr. Donaghue is a recognized expert in building codes. The ASME publishes both the A.17 handbook and the ANSI standards. Consequently, the A.17 Handbook may assist the Court in interpreting the A.17 code as adopted by the Maryland legislature.

Under the Maryland Code, the Commissioner of the Department of Labor, Licensing and Regulation may delegate its duties and functions under the elevator and escalator code to the Chief Elevator-Escalator Inspector. See Md. Code Ann., Art. 89, § 49B(1) (1998). Therefore, under such delegation, the Chief Inspector is empowered to enforce the elevator and escalator safety code to the extent authorized by the Commissioner. The Maryland Court of Appeals has stated that "the question whether a particular regulation of an administrative official is arbitrary or unreasonable, or not fairly within the scope of the delegated power, is subject to judicial review; but if the matter is fairly debatable, the court should not substitute its judgment for the judgment of the administrative official who is charged with the duty of

promulgating the regulation." *Pressman v. Barnes, 209 Md. 544, 553, 121 A.2d 816, 821 (1956).* "The modern tendency of the courts is toward greater liberality in permitting grants of discretion to administrative officials in order to facilitate the administration of the laws as the complexity of governmental and economic conditions increases." *Pressman, 209 Md. at 555, 121 A.2d at 822.* Although the field directive does not appear to be a formally promulgated regulation, it is an interpretation of the code and regulations that the Chief Elevator-Escalator Inspector was charged with administering. See *Board of County Comm'rs v. Milstead, 258 Md. 477, 489, 265 A.2d 879, 884 (1970)* (finding administrative order was valid exercise of delegated authority by the Director of the Department of Fire). "Courts give significant weight to the agency's interpretation of the statute that it is required to administer." *Adamson, 359 Md. at 266, 753 A.2d at 516.* As the Chief Inspector's prohibition on the use of escalators as stairway does not conflict with the statute, the Court defers to the agency interpretation. See *Controller, Anne Arundel County v. Pleasure Cove Yacht Club, Inc., 334 Md. 450, 466, 639 A.2d 685, 693 (1994)* ("Administrative construction is entitled to considerable weight."). The prohibition recognizes legitimate safety concerns flowing from the use of escalators as stairways, such as the differences in construction. Furthermore, the record indicates that the opinion of the Chief Elevator-Escalator Inspector is still in effect as, subsequent to the accident, WMATA secured a waiver from the prohibition on the use of escalators as walker. Accordingly, the Court concludes the opinion of the Chief Inspector as to the interpretation of the elevator and safety code provides a sufficient basis for establishing a statutory violation.

As a passenger exiting the Defendant's metro station, the Plaintiffs' son was obviously a member of the class sought to be protected by the escalator and elevator safety code. Nevertheless, even assuming the ANSI standards, as interpreted by Plaintiff's expert and the Chief Inspector, represent the statutory standard of care and the Bethesda Metro station housed several violations, Plaintiffs must establish that each cited provision was adopted to prevent

the type of harm suffered by their son. Section 49B was enacted for the purpose of making the requirements of the ANSI code applicable to "elevators, dumbwaiters, escalators, and moving walks only to the extent the requirements are adopted by the Commissioner of Labor and Industry." Plaintiffs' expert discusses at length the inadequacies in the lighting and the placing of signs in the station according to the ANSI codes. Yet, there is no evidence that the injury suffered by Mr. Smith (a heart attack) was the type of harm to be protected by the statute. Similarly, the prohibition on the use of escalators as walkers, as suggested by Plaintiffs, would appear to apply equally to the shortest escalator in the WMATA system as well as the longest. Plaintiffs have not proffered evidence supporting any logical connection between subjecting passengers to the type of overexertion that could precipitate a heart attack and the alleged violations of the A.17 code. Under the current record and drawing all reasonable inferences in their favor, Plaintiffs have not sustained their burden of showing that the injury suffered by their son was of the kind contemplated by the legislature in adopting the A. 17 code. Therefore, as a matter of law, Plaintiffs have not shown the alleged violations proximately caused their son's death, and an action for damages may not lie based upon the theory of a statutory violation.

D. Scope of WMATA Immunity

The final issue before the Court is whether WMATA is immune to Plaintiff's negligence claim. The WMATA compact insulates the Defendant from liability for governmental actions. The WMATA provides, in pertinent part, that

> The Authority shall be liable for its contracts and for its torts and those of its Directors, officers, employees and agent committed in the conduct of any proprietary function, in accordance with the law of the applicable signatory (including rules on conflict of laws), but shall not be liable for any torts occurring

> in the performance of a governmental function.

D.C. Code § 1-2431(80). Maryland is a signatory to the WMATA Compact. Therefore, the Court must address whether Plaintiffs' cause of action falls within the ambit of WMATA's immunity. The Fourth Circuit has recognized that Section 80 of the WMATA Compact confers immunity to WMATA for governmental functions, but has not addressed what acts qualify as governmental functions under the WMATA Compact. See *Hill v. Washington Metropolitan Area Transit Authority, 816 F.2d 672* available at *1987 WL 37096* at *2 (4th Cir.1987) (unpublished decision) (affirming district court's finding of negligence for bus driver's failure to pull completely off the highway). The District of Columbia Circuit has construed the scope of immunity granted to WMATA under the Compact to be a question of federal law. *Burkhart v. Washington Metro. Area Transit Auth., 324 U.S. App. D.C. 241, 112 F.3d 1207, 1216 (D.D.C. Cir. 1997).* In determining the scope of the federal immunity, the Court of Appeals looked to the construction of governmental immunity under the Federal Tort Claims Act ("FTCA"), *28 U.S.C. 1346*(b). *112 F.3d at 1216.* "The liability of the United States under the FTCA is limited by the discretionary function exception[, *28 U.S.C § 2680*(a)]." *Williams v. United States, 50 F.3d 299, 308 (4th Cir. 1995).* In *United States v. Gaubert, 499 U.S. 315, 322, 111 S. Ct. 1267, 1273, 113 L. Ed. 2d 335 (1991),* the Supreme Court outlined the proper considerations to determine what conduct fell within the scope of governmental immunity under the discretionary exception of the FTCA. The Court stated that "the exception covers only acts that are discretionary in nature, acts that 'involve an element of judgment or choice.'" *499 U.S. at 322, 111 S. Ct. at 1273* (quoting *Berkovitz v. United States, 486 U.S. 531, 536, 108 S. Ct. 1954, 1958, 100 L. Ed. 2d 531 (1988)).* "The requirement of judgment or choice is not satisfied if a 'federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow,' because 'the employee has no rightful option but to adhere to the directive.'" *499 U.S. at 322, 111 S. Ct. at 1273* (quoting

Berkovitz, 486 U.S. at 536, 108 S. Ct. at 1958-59). "Even 'assuming the challenged conduct involves an element of judgment,' it remains to be decided 'whether that judgment is of the kind that the discretionary function exception was designed to shield.'" *499 U.S. at 322-23, 111 S. Ct. at 1273* (quoting *Berkovitz, 486 U.S. at 536, 108 S. Ct. at 1958-59).* The exception applies to those decisions which viewed objectively one "would expect inherently to be grounded" in considerations of economic, social, or political policy. *Baum v. United States, 986 F.2d 716, 721 (4th Cir. 1993).* Essentially, the focus is on whether the actor's conduct is "of the nature and quality that Congress intended to shield from tort liability.'" *Williams, 50 F.3d 299, 309* (quoting *United States v. Varig Airlines, 467 U.S. 797, 813, 104 S. Ct. 2755, 2764, 81 L. Ed. 2d 660 (1984)).*

Therefore, WMATA is immune to suit for discretionary actions, such as hiring and firing metro employees or the design, construction, and location of its facilities and instrumentalities. See *Burkhart, 112 F.3d at 1216; Souders v. WMATA, 310 U.S. App. D.C. 370, 48 F.3d 546, 548 (D.D.C. 1995).* "WMATA, however, can be liable for a broad range of conduct which implements its discretionary decisions." *Beatty v. WMATA, 274 U.S. App. D.C. 25, 860 F.2d 1117, 1127 (D.C.Cir. 1988);* see also *Gillot v. WMATA, 507 F. Supp. 454, 457 (D.D.C.1981)* (finding that WMATA's failure to take adequate security precautions for the safety of its patrons using its parking lot was not protected by immunity). The District of Columbia Circuit has drawn a distinction between tort claims subject to immunity and those where liability may lie. In Beatty, the plaintiff sued for nuisance based upon the damage to her home caused by the vibrations generated by passing metro trains. *860 F.2d at 1119.* The plaintiff alleged that the damage resulted from WMATA's failure to lay the tracks for the trains according to its own guidelines. Id. The Court found that the grant of summary judgment was improper as "a genuine issue of fact existed as to whether the alleged nuisance resulted from a governmental ("design") or proprietary ("implementation") function." *Souders, 48 F.3d at 550* (interpreting Beatty). In Souders v. WMATA, the plaintiff sued for nuisance because

the noise of the trains exceeded the maximum decibels allowed under the local noise control ordinance. *48 F.3d at 548.* However, under the established WMATA policy, the noise levels of the trains did not justify the erection of a sound barrier. Id. at 549. Thus, the Souders Court found that the decision not to install a sound barrier pursuant to that policy was protected by immunity. Id. at 550.

In the present case, Plaintiffs do make allegations citing faulty design based upon the alleged statutory violations of the ANSI code as incorporated by the Maryland elevator and escalator safety code. As discussed earlier, the Court has found the Plaintiffs may not base their claims on the alleged statutory violations due to the lack of proximate cause. As such, the Court need not address the question of whether WMATA is immune to suit for injuries caused by the alleged statutory violations.[2] As to the existence of a policy on the subject matter, this case is particularly unique because WMATA's sovereign immunity is derived from Maryland and the other signatories to the Compact. The Chief Elevator-Escalator Inspector did specifically proscribe the use of station escalators as walkers. In fact, escalator 2 was barricaded because the state inspector refused to permit its use as a walker. Thus, a question arises as to what role the state directive has in determining whether WMATA had a legitimate element of judgment or choice in using escalator 1 as a walker. The available precedent indicates that the existence of a *federal* statute, regulation, or policy is needed to dispense with the immunity question. *Gaubert, 499 U.S. at 322, 111 S. Ct. at 1273; Souders, 48 F.3d at 550.* Thus, it appears the state directive has no effect on the availability of immunity. It is undisputed that, at the time of the incident, WMATA had no formal policy or directive in place establishing procedures for ingress and egress when none of the escalators at a station are operating. Consequently, WMATA's claim of immunity rests upon establishing that the decisions affecting the maintenance and repair of the primary means of ingress and egress from the station qualifies as a judgment based on considerations of public policy.

The Fourth Circuit has not expressly addressed the issue before the Court. In Baum v. United States, the court held

that "the decision of how and when to replace a major element of a substantial public facility is, like decisions involving design and construction, ... inherently bound up in considerations of economic and political policy . . . ." *986 F.2d 716, 724 (4th Cir. 1993).* However, the court also stated that not "every maintenance decision of every government actor is so policy-based as to fall within the discretionary function exception" limiting its holding to the facts of the case. Id. Under the facts of that case, there was no suggestion of deterioration, rather the plaintiff argued for outright replacement of a guardrail. *Id. at 723 n.3.* Thus, the court concluded that "there is really no question as to maintenance, the [alleged] fault, if any, was in design and construction." Id. Similarly, in *Bowman v. United States, 820 F.2d 1393, 1394 (4th Cir. 1987),* the plaintiff challenged a decision implicating the design and construction of a national highway specially designed for sightseeing and leisure driving.

In the present case, Plaintiffs make concrete allegations of WMATA's failure to maintain and repair the existing escalators used as the primary means for accessing and exiting the Bethesda metro station. The Court believes that this case presents the type of situation to which Congress and the signatories to the WMATA Compact intend to waive immunity. The duty of a common carrier to provide a safe means of ingress and egress is widely recognized. This is particularly true in the instance of an underground railway where the common carrier controls the avenues of entrance and exit. The passengers cannot tunnel out of the ground on their own. They are confined to the routes the carrier provides. The Court believes that maintaining and repairing the existing instrumentalities of ingress and egress from the premises of a common carrier is not the type of decision inherently grounded in regulatory, economic, or social policy. Others courts have similarly found that the discretionary exception does not apply to the failure to properly maintain and repair existing facilities that are intended for public use. See *Gotha v. United States, 36 V.I. 392, 115 F.3d 176, 181-82 (3d Cir. 1997); Dant v. District of Columbia, 264 U.S. App. D.C. 284, 829 F.2d 69, 75 (D.C.Cir.1987)* (finding that

faulty maintenance and operation of fare collection machines was not included within the scope of WMATA immunity); *Wainwright v. WMATA, 903 F. Supp. 133, 140 (D.D.C. 1995)* (concluding that failure to maintain station escalator was not within the scope of WMATA immunity); *Arkansas River Co. v. CSX Transportation, 780 F. Supp. 1138, 1140-41 (W.D.Ky. 1991)*. Accordingly, the Court finds that Plaintiff's negligence claims for failure to maintain and repair the escalators is not barred by WMATA's immunity under the WMATA Compact.

III. CONCLUSION

In conclusion, Plaintiffs have produced sufficient evidence to create a triable issue as to Defendant's liability for ordinary negligence. However, Plaintiffs have not sustained their burden to show that the alleged statutory violations proximately caused Mr. Smith's heart attack. Furthermore, the alleged design defects in the metro stations falls within the scope of WMATA's grant of immunity. Nonetheless, the heart of Plaintiff's complaint is the failure to repair and maintain the primary means of ingress and egress from the station's premises. The Court concludes that this conduct does not fall within the scope of WMATA's immunity. For the reasons stated above, the Court denies Defendant's motion for summary judgment. An Order consistent with this Opinion will follow.

February 7th, 2001

Date

Alexander Williams, Jr.

United States District Judge

ORDER

For the reasons stated in the accompanying Memorandum Opinion dated February 7th, 2001 and on the record, IT IS this 7th day of February, 2001 by the United States District Court for the District of Maryland, hereby **ORDERED:**

1. That Defendant's Motion for Summary Judgment [24-1] BE, and the same hereby IS, **DENIED**; and

2. That the Clerk of the Court mail copies of this order to all counsel of record.

Alexander Williams, Jr.

United States District Judge

Footnotes

n1 On September 28, 1998, the Chief Elevator-Escalator Inspector stated "it has always been this division's view that if an escalator is not running it should not be used as stairs allowing individuals to access and egress . . . ." Division of Labor and Industry, Field Directive 98.2 (Sept. 28,1998).

n2 Although the Court notes that the existing precedent indicates that the decisions with respect to making the station escalators the primary means of accessing and exiting the station, as well as lighting and the placing of signs, are design decisions that inherently invoke considerations of public policy to which WMATA would be immune from suit. See *Baum v. United States, 986 F.2d 716, 721-22 (4th Cir. 1993); Dant v. District of Columbia, 264 U.S. App. D.C. 284, 829 F.2d 69 (D.C.Cir.1987),*

No. 01-1345
CA-99-2187-AW

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

RICHARD LEE SMITH, Individually and as Personal Representative of the Estate of Richard Hadaway Smith, Deceased; NANCY G. SMITH, Individually and as Personal Representative of the Estate of Richard Hadaway Smith, Deceased,
Plaintiffs-Appellees,

v.

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY,
Defendant-Appellant.

June 4, 2002 Filed

On Petition for Rehearing and Rehearing En Banc

The Appellees' petition for rehearing and rehearing en banc was submitted to this Court. As no member of this Court or the panel requested a poll on the petition for rehearing en banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and rehearing en banc is denied.

For the Court,

/s/ Patricia S. Connor
CLERK